IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1412

DONALD JAMES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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UNITED STATES OF AMERICA, RESPONDENT

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Petitioner Donald James respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on February 12, 1979.

OPINIONS BELOW

The panel opinion of the Court of Appeals was reported at 576 F.2d 1121

(5th Cir. 1978). An en banc judgment was entered on February 12, 1979, and is not yet reported. The panel and en banc decisions are reproduced respectively in Appendix A and B, infra.

JURISDICTION

The en banc judgment of the court of appeals was entered on February 12, 1979. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

ONE

Does a conflict exist among the circuits as to the standard of proof required for the admission of conspiratorial statements under Rules 104(a) and Rule 801(d)(2)(E) of The Federal Rules of Evidence?

TWO

Should the court of appeals have remanded the instant case back to the district court for specific findings as required by Rule 104(a)?

THREE

Does a conflict in principle exist between the finding by the court of appeals of one, overall conspiracy and the decision of this Court in Kotteakos v. United States, 328 U.S. 750 (1946) or the analytical model of United States v. Borelli, 336 F.2d 376 (2d Cir. 1964)?

FOUR

Did the court of appeals, in upholding the verdict on the sufficiency issue depart from the accepted and usual cause of judicial proceedings as to call for an exercise of this Court's supervising power?

STATUTES INVOLVED

RULE 104, FEDERAL RULES OF EVIDENCE

(a) QUESTIONS OF ADMISSIBILITY GENERALLY. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the privisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) RELEVANCY CONDITIONED ON FACT. When

the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) HEARING OF JURY. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require, or when an accused is a witness, if he so requests.

RULE 801(d)(2)(E), FEDERAL RULES OF EVIDENCE

A statement is not hearsay if. . .the statement is offered against a party and is. . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

STATEMENT OF THE CASE

Petitioner Donald James was indicted on May 18, 1976. The one-count indictment charged Petitioner and eleven codefendants with conspiracy to possess heroin and cocaine with intent to distribute in violation of Title 21, U.S.C. § 841(a)(1) and Title 18, U.S.C. § 2. Of twelve named defendants, five proceeded to trial. Petitioner was found guilty on January 21, 1977

and was sentenced on March 1, 1977 to fifteen years incarceration under the provisions of Title 18, U.S.C. § 4205(c).

A panel decision of the Fifth Circuit was rendered on July 20, 1978. Inter alia, the opinion held that a fatal variance did not exist between the conspiracy alleged and the conspiracy proven; that the Fifth Circuit's procedure for determining the admissibility of coconspiratorial statements under the dictates of United States v. Apollo, 476 F.2d 156 (5th Cir. 1973) was to be replaced by Rule 104(a) of the Federal Rules of Evidence; and sufficient evidence was introduced to support Petitioner's conviction.

On its own motion, en banc consideration was given by the court of appeals. A decision was entered by the en banc court on February 12, 1979. The full text of the panel decision is attached as Appendix A. Appendix B consists of the as yet unreported

en banc decision.

REASONS FOR GRANTING THE WRIT

ONE

The decision of the court of appeals conflicts with the decisions of other circuits. Pursuant to Rule 104(a) of the Federal Rules of Evidence, the trial court must determine the admissibility of coconspiratorial statements proffered under Rule 801(d)(2)(E) of the Federal Rules of Evidence. The court of appeals ruled that "substantial" evidence, rather than a "preponderance" of evidence was all the trial court needed to consider in reaching his threshold determination of admissibility. [Appendix B at B-7]. As correctly noted by the court below, such a ruling is in disagreement and in conflict with the decision of the First[1], Sixth[2], and Eighth[3] Circuits,

[1]United States v. Petrozziello, 548 F.2d 20 (1st Cir. 1976).

[2]United States v. Enright, 579 F.2d 980 (6th Cir. 1978).

[3]United States v. Bell, 573 F.2d 1040 (8th Cir. 1978).

which have applied the "preponderance" test.

The impact of Rule 104(a) and its relation to Rule 801(d)(2)(E) presents an important issue appropriate for resolution by this Court.[4] Determination of conspiratorial non-hearsay is not limited to conspiracy trials. As noted in the concurring opinion of the court of appeals:

> The majority's rule affects any prosecution implicating scheme-type criminal conduct. For example, it would apply to prosecutions for aiding and abetting, 18 U.S.C. § 2 (1976), and those brought under the many statutes Congress has enacted to combat organized crime, e.g., 18 U.S.C. § 1955 (1976) (prohibition of illegal gambling business); 18 U.S.C. §§ 1961-68 (1976)(the RICO statute). Moreover, the majority's approach goes beyond

[4]Conflicts also exist as to circuits which have not addressed the issue of standard of proof in terms of Rules 104(c) and 801(d)(2)(E). See, United States v. Stanchich, 550 F.2d 1294, 1298 (2nd Cir. 1977); United States v. Geany, 417 F.2d 1116 (2nd Cir. 1964); cf. United States v. Rodrigues, 491 F.2d 663 (3rd Cir. 1974); United States v. Herrera, 407 F.Supp. 766 (N.D. Ill. 1975); United States v. King, 552 F.2d 833 (9th Cir. 1976), citing United States v. Carbo, 314 F.2d 718 (9th Cir. 1963); United States v. Pisciotta, 469 F.2d 329 (10th Cir. 1972).

> even the criminal realm to dictate the standards for the admissibility of coconspirator declarations in civil trials, because the Federal Rules of Evidence are applicable in both civil and criminal cases, Fed.R.Evid. 1101 (b).

Appendix B, at B13, footnote 1.

To insure a uniformity of decisions, these conflicts justify the grant of certiorari to review the judgment below.

TWO

The court of appeals should have remanded the instant case back to the district court for specific findings as required by Rule 104(a).

At oral argument before the en banc court of appeals, counsel argued that at a minimum, the instant case should have been remanded for specific findings as required by Rule 104(a). Rule 104(a) requires that preliminary questions concerning the admissibility of evidence shall be determined by the trial judge. As was recognized by the panel opinion of the court of appeals. . .

> The same risk of prejudice to the defendant against whom coconspirator statements are proffered calls for a procedure which will minimize the possibility of a conviction based even in part on inadmissible evidence. We believe that it is unrealistic to assume that a jury will always engage in the two-step process of determining admissibility and then guilt. It is entirely likely that the jury will be so affected by the content of the very statements whose admissibility they are considering that the issue of admissibility will never actually and finally be resolved. Nor is a defendant adequately protected by the judge's preliminary determination that the government's proof is adequate to support a jury finding of the fulfillment of all of the conditions. This was the practice challenged in Jackson v. Denno, supra, with regard to confessions. Yet the Supreme Court found it no substitute for an actual, full, clear-cut, and reliable determination.

576 F.2d at 1129.

Carrying the analogy of Jackson v. Denno to its logical conclusion, an actual, full, clear-cut, and reliable determination on the record must appear to adequately preserve for appellate review the "determina-

tion" arrived at by the trial court. No such finding existed in the instant case. Remand for specific findings is required by Rule 104(a) and the due process protections of fundamental fairness.

THREE

Petitioner was indicted for willfully and knowingly conspiring with eleven named codefendants and four unindicted coconspirators in what was alleged to be a narcotics distribution network spanning from Los Angeles to Atlanta to Philadelphia. As adduced at trial, however, two separate, isolated groups were proven. The only nexus existing between the two groups was codefendant Fred Hill. A fatal variance developed to the prejudice of Petitioner.

The court of appeals resolved the issue of single versus multiple conspiracies through application of its prior decision of United States v. Becker, 569 F.2d 951 (5th Cir. 1976). 576 F.2d at 1126. Affirmance of Petitioner's conviction on the

multiple conspiracy issue was based upon misapprehensions of both fact and law. The record clearly demonstrates that Petitioner had no common goal, that the nature of conspiratorial agreements showed two separate schemes, and participants did not overlap. See, Becker, supra.

As applied to the matter sub judice, the analysis utilized by the court of appeals directly varies from the dictate of this Court that although separate schemes may have similar objectives, constitutional muster cannot be passed if each scheme was an end in itself and arose from a separate agreement. See, Kotteakos v. United States, 328 U.S. 750 (1946). See also, United States v. Perez, 489 F.2d 51 (5th Cir. 1973). Proper analysis of the instant question has been given by the Second Circuit:

> [T]he scope of his (each defendant's) agreement must be determined individually from what was proved as to him. If, in Judge Learned Hands' well-known

> phrase, in order for a man to be held for joining others in a conspiracy, he 'must in some sense promote that venture himself, make it his own,' it becomes essential to determine just what he is promoting and making 'his own'.

United States v, Borelli, 336 F.2d 376, 385 (2nd Cir. 1964).

Justice Jackson noted in his concurring opinion in Krulewitch v. United States, 336 U.S. 440, 445 (1949):

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the substantive offenses have, or in addition thereto, suggest that loose practice as to this offense constitutes a serious offense to the fairness in our administration of justice.

Such a situation developed in the case of Petitioner.

FOUR

The court of appeals, in upholding the verdict on the sufficiency issue departed from the accepted and usual cause of judicial proceedings as to call for an excercise of this Court's supervisory power.

Evidence introduced against Petitioner came only through the person of unindicted coconspirator Marlene Cochran. Cochran allegedly accompanied Petitioner on a trip from Philadelphia to Atlanta at the end of 1973 "around New Year's Eve". Cochran was then purportedly utilized to repackage bundles of heroin and transport them back to Philadelphia.[5] Cochran admitted active heroin addiction during the time of the alleged trip. When questioned in regard to the basic chronology of the "New Year's Eve" trip, Cochran could give no recollection "because half the time I was high, ya know". When not using heroin, Cochran was addicted to methadrene, an amphetamine-type drug. Cochran admitted to having

[5]Cochran further testified to telephone messages she received from codefendant Fred Hill when Hill was purportedly seeking Petitioner for an Ohio to Atlanta drug transaction.

active hallucinations during the time of her addiction. Furthermore, she understood at the time of trial that she was not to be prosecuted as a result of her trial testimony.

In denying Petitioner's contention that the trial erred in failing to grant his motion for judgment of acquittal, the panel paraphrased the oft-cited decision of Glasser v. United States, 315 U.S. 60 (1942). Judge Tuttle noted:

> We are compelled of course to view the evidence on appeal from a jury verdict of guilty in the light most favorable to the government and to accept all reasonable inferences and credibility choices which will uphold the verdict.

576 F.2d at 1223, 1224.

Justice Murphy, in delivering the Glasser opinion, however, went beyond the "light most favorable to the government" standard. A key phrase is found in the original text:

> The verdict of a jury must be sustained if there is substantial

> evidence, taking the view most favorable to the government, to support it.

Glasser, supra, at 80.

Although the evidence must be viewed in the light most favorable to the government, "complete judicial abdication to the trier of fact is not required". United States v. Peterson, 488 F.2d 645, 649 (5th Cir. 1974). See also, Washington v. United States, 357 U.S. 348 (1958). At some point, the judicial conscience must recognize that on the basis of the evidence adduced, the jury must necessarily have had a reasonable doubt as to the inconsistency and incredibility of the evidence to exclude every reasonable hypothesis but that of guilt. Due process, as guaranteed by the Fifth Amendment to the United States Constitution, demands nothing less.

The decision of the panel on the issue of sufficiency of the evidence is a precedent setting error of exceptional

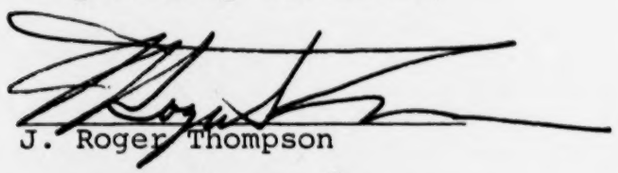
public importance. To allow the decision to stand by necessity jeopardizes the ability of a criminal defendant accused of membership in a narcotics conspiracy to obtain a constitutionally permissible trial.

CONCLUSION

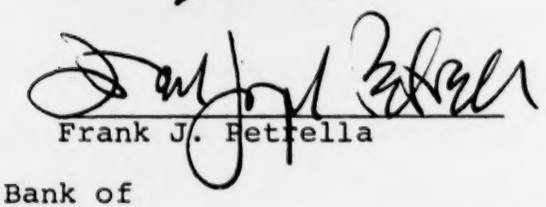
For the foregoing reasons, Petitioner prays that his petition for a writ of certiorari be granted.

This the fourteenth day of March, 1979.

Respectfully submitted,



J. Roger Thompson



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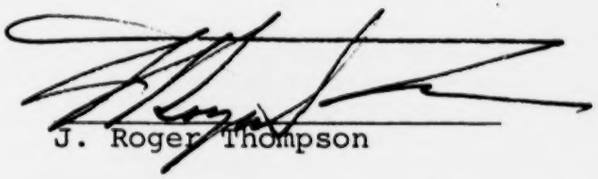
CERTIFICATE OF SERVICE

We hereby certify that on this fourteenth day of March, 1979, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.



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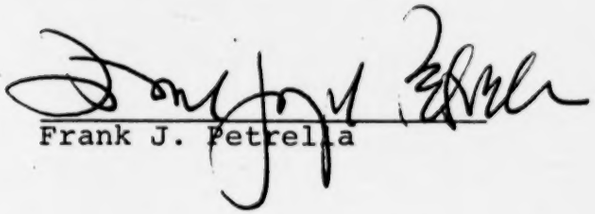

Frank J. Petrella

UNITED STATES of America, Plaintiff-Appellee,

v.

Donald JAMES and David Anthony Butler, Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

Henry SMITH and Kenneth Wayne Whitmore, Defendants-Appellants.

Nos. 77-5188, 77-5271.

United States Court of Appeals, Fifth Circuit.

July 20, 1978.

Defendants were convicted in two separate trials before the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., of conspiracy to possess heroin and cocaine with intent to distribute, and they appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) evidence sustained convictions; (2) trial court did not err in refusing to permit defense counsel to examine arms of government witness for evidence of recent drug addiction; (3) defendants were not prejudiced by admission of records of telephone calls made from specified residence, since neither defendant was a party to any phone calls from such residents, and (4) in determining admissibility of statements made by alleged coconspirator, trial court alone is to make threshold determination as to whether there was a conspiracy, whether statements were made during course of and in furtherance of conspiracy, and whether declarant and defendant were members of conspiracy.

Affirmed.

1. Criminal Law ⇐1144.13(3, 5)

Court of Appeals is compelled to view evidence on appeal from jury verdict of guilty in light most favorable to Government and to accept all reasonable inferences and credibility choices which will uphold the verdict.

2. Conspiracy ⇐40.1

A conspirator need not be involved in every transaction comprising the conspiracy in order to be convicted.

3. Criminal Law ⇐351(5)

In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, evidence that defendant, when arrested by police officer pursuant to warrant issued after defendant's failure to appear for trial, denied his identity and had another person's driver's license in his pocket was properly introduced to show flight and a guilty mind.

4. Conspiracy ⇐47(12)

Evidence in prosecution for conspiracy to possess heroin and cocaine with intent to distribute sustained convictions. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

5. Conspiracy ⇐48.1(1)

Existence of multiple conspiracies is a fact question for the jury.

6. Conspiracy ⇐40.1

Each member of conspiracy need not be familiar with all of details of illegal scheme as long as he knows its general scope; nor is it necessary for all of coconspirators to know each other or to work together on every transaction.

7. Criminal Law ⇐622(2)

Evidence in prosecution for conspiracy to possess heroin and cocaine with

intent to distribute sustained finding that defendants were members of the one conspiracy alleged, and therefore, trial court did not err in denying defendants' motion to sever. Comprehensive Drug Abuse Prevention and Control Act of 1970, §§ 401(a)(1), 406, 21 U.S.C.A. §§ 841(a)(1), 846.

8. Witnesses ⇐344(2)

In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, trial court did not err in refusing to permit defense counsel to examine the arms of government witness for evidence of recent drug addiction, in view of fact that jury was fully aware of witness' prior drug addiction, and defense counsel did not establish any qualifications as expert in identifying recent drug addiction by examination of an addict's arms.

9. Criminal Law ⇐1169.1(2)

In prosecution for conspiracy to possess heroin and cocaine with intent to distribute, admission of records of telephone calls made from specified residence did not constitute prejudicial error, in view of fact that neither defendant was a party to any phone calls from such residence.

10. Criminal Law ⇐423(1)

Under long-recognized exception to hearsay rules, statement made by one member of a conspiracy during the course of and in furtherance of the conspiracy may be used against other members of conspiracy if certain conditions are met.

11. Criminal Law ⇐423(1), 428

In determining admissibility of statement made by alleged coconspirator, trial court alone is to make threshold determination as to whether there was a conspiracy, whether statement was made during course of and in furtherance of a conspiracy, and whether declarant and defendant were members of conspiracy; coconspirator's statements are admissible if trial court is convinced by a preponderance of evidence that conspiracy existed, that defendant and declarant were members of it, and that the statements were made in the course of and in furtherance of the conspiracy. Federal Rules of Evidence, rules 104(c), 801(d)(2)(A), 28 U.S.C.A.

12. Criminal Law ⇐427(5)

Conditions of admissibility of coconspirator's statements must be established from evidence independent of the coconspirator's statements themselves. Federal Rules of Evidence, rules 104(c), 801(d)(2)(A), 28 U.S.C.A.

13. Criminal Law ⇐427(2)

Under Federal Rules of Evidence, trial court must not admit coconspirators' declarations unless it has determined that Government had made the required threshold showing. Federal Rules of Evidence, rule 104(c), 28 U.S.C.A.

14. Criminal Law ⇐671

Under Federal Rules of Evidence, justice requires that determination of admissibility of coconspirators' declarations and any hearings necessary for the judge to make that determination by a preponderance of the evidence be conducted outside the presence of jury. Federal Rules of Evidence, rule 104(c), 28 U.S.C.A.

15. Criminal Law ⇐779

Once trial court has determined out of hearing of jury that coconspirators' statements are admissible, jury is not to be instructed to make its own determination of admissibility. Federal Rules of Evidence, rules 104, 801(d)(2)(E), 28 U.S.C.A.

16. Criminal Law ⇐427(5)

Evidence in prosecution for conspiracy to possess heroin and cocaine with intent to distribute sustained finding that conspiracy existed, that each of defendants were members of it, and that coconspirators' statements were made in the course of and in furtherance of the conspiracy, and therefore, coconspirators' statements were admissible. Federal Rules of Evidence, rule 801(d)(2)(A), 28 U.S.C.A.

Appeals from the United States District Court for the Northern District of Georgia.

Before TUTTLE and CLARK, Circuit Judges and EDENFIELD,* District Judge.

TUTTLE, Circuit Judge:

These appeals arise from two separate trials but involve the same alleged conspiracy, revolving around Fred Hill in Atlanta, to bring in heroin and cocaine from California for distribution in Atlanta and Philadelphia. Appellants James and Butler, who were tried first along with four other co-defendants, were convicted of conspiracy to possess heroin and cocaine with the intent to distribute, in violation of 21 U.S.C. §§ 841(a)(1) and 846, but the jury was unable to reach a verdict as to Smith and Ernestine Bassey, the alleged California supplier. The court granted a motion for acquittal for one codefendant, Constance Smith (appellant Smith's daughter), and the jury acquitted Cheryl Dumas. A month later Smith was retried along with appellant Whitmore, who had failed to appear for the earlier joint trial. At the second trial, both Smith and Whitmore were convicted on the same charge as Butler and James, and all four appeal.

I. The Conspiracy

The evidence at both trials established that Hill obtained heroin from sources in California. Johnny Mack Gordon, an unindicted co-conspirator who testified for the prosecution, assisted Hill in distributing heroin from Hill's white Mercury Comet "stash" car, which was parked at Gordon's apartment. Gordon made deliveries to several people in Atlanta, as directed by Hill, and he collected $1,000 to $1,200 per one-ounce package when Hill told him to do so. Gordon had no personal knowledge that the packages contained heroin, but he said that Hill referred to the substance as "boy," a nickname for heroin. Gordon described the contents of the packages as a brown powder and "guessed" that it was heroin. When Gordon first began making deliveries for Hill early in 1974, the trunk contained 25 one-ounce packages. It was refilled on two later occasions, both times after Lillian Peeples, an unindicted co-conspirator, had transported drugs to Atlanta from California. The last supply was seized when Gordon was arrested in August 1974. Laboratory reports showed that the trunk of the stash car contained 44 ounces of heroin and three ounces of cocaine. Other drug paraphernalia were also seized. The jury was justified in inferring that the packages delivered by Gordon for Hill in Atlanta contained heroin and that it came from California.

There was also testimony from which the jury could conclude that Hill supplied heroin for distribution in Philadelphia. Marlene Cochran, an unindicted co-conspirator, testified that she flew to Atlanta from Philadelphia around New

* United States District Judge, Northern District of Georgia, sitting by designation.

Year's Eve in 1973 with James and another individual. She and James received heroin from Hill, who took it from the trunk of a white Ford or Mercury parked in an apartment complex. Cochran repackaged the heroin at James' direction and carried it back to Philadelphia for James. We conclude, then, that the existence of the conspiracy alleged in the indictment was proved beyond a reasonable doubt.

We turn now to a consideration of each appellant's role in the conspiracy. The facts relating to each appellant's alleged participation are largely uncontested because none of them chose to offer any evidence in their defense. We must decide whether the evidence presented by the government was sufficient to support the convictions and whether one conspiracy or more were shown. Certain other issues, including a reconsideration of our court's treatment of the so-called co-conspirator hearsay exception, are also raised and are discussed below.

II. Sufficiency of the Evidence

[1] We are compelled, of course, to view the evidence on appeal from a jury verdict of guilty in the light most favorable to the government and to accept all reasonable inferences and credibility choices which will uphold the verdict. *Glasser v. United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942).

A. James

In addition to the evidence already mentioned above concerning James' role in transporting heroin from Hill in Atlanta to Philadelphia, Cochran also testified that on a later occasion when she was staying at Smith's house in Atlanta, Hill called from Ohio looking for James because Hill had a package for him. Hill wanted James to pick it up so he could get it on the streets.

[2] We believe that these two incidents are sufficient to support the jury's verdict of guilty beyond a reasonable doubt. James argues that Hill on one occasion went into a separate room to discuss a drug deal with Patrick Gonsalves, an unindicted co-conspirator, and that this proves that James was not privy to Hill's conspiracy. However, it is well settled that a conspirator need not be involved in every transaction comprising the conspiracy in order to be convicted. *United States v. Becker*, 569 F.2d 951 (5th Cir. 1978).

B. Butler

The most damaging evidence against Butler came from two witnesses: Gordon and Gonsalves. Gordon described two occasions on which he delivered one-ounce packages of heroin to Butler at his home in Decatur. Gonsalves testified about two incidents both of which link Butler to the drug distribution conspiracy. Gonsalves was present at Butler's home one time when Hill came over with two ounces of heroin for Butler so that Butler could strengthen an earlier delivery which had been overcut. Hill cut and bagged cocaine in Butler's presence. On another occasion Gonsalves met with Hill and Butler at a friend's apartment. Hill, who had a new shipment of heroin contained in three large bags, gave a small amount to Butler as a sample. This evidence is clearly sufficient to prove Butler's knowing participation in the alleged conspiracy.

C. Whitmore

The two main witnesses against Whitmore were Gordon and Gonsalves. Gordon testified that Whitmore had approached him at the airport where Gordon worked during the late spring or early summer of 1974. Whitmore told

Gordon that he had discussed a transaction with Hill and wanted to get in touch with him. Hill was out of town and could not be reached. So Gordon drove with Whitmore to Gordon's apartment and left Whitmore in front while Gordon went to the stash car parked in the back, got two ounces of heroin, and delivered them to Whitmore. Gordon, who stated that he never told buyers where the stash car was located, did not take Whitmore to the car or tell him where it was. Gordon did not get any money from Whitmore because Whitmore did not say what arrangement he had made with Hill for payment. Gordon testified that he did not normally make deliveries without Hill's authorization, but he did so on this occasion because Whitmore said "it had been pre-arranged, and I couldn't get in touch with [Hill]; I went ahead and did it." This incident constitutes the only nonhearsay evidence tying Whitmore to the conspiracy.

When Hill returned in a couple of days, Gordon told him what had occurred in his absence. Hill said Whitmore had lied to Gordon, that he had made no such agreement with Whitmore before he left, and that Gordon should not have done it. Hill also told Gordon that Whitmore already owed Hill money.

Gonsalves testified that he frequently purchased heroin from Hill either directly or through Gordon and that Hill had agreed to sell to Gonsalves through Gordon when Hill was out of town. In the summer of 1974 Hill asked Gonsalves if he had seen Whitmore. Hill said that he was looking for Whitmore because he had given him five ounces of heroin for which he had not been paid and that when Hill was out of town Gordon had given him five more ounces for which Hill had also not been paid. Gonsalves described Hill as angry. A few days later Hill told Gonsalves that he had seen Whitmore and had gotten his money. On cross-examination Gonsalves said that he did not know whether Whitmore was working with Hill and that he did not believe that the two worked together on getting drugs from California. Gonsalves had told the grand jury that Hill and Whitmore had separate California connections.

[3] The only other evidence which related directly to Whitmore involved his failure to appear for trial on the date originally set. A police officer testified that he had arrested Whitmore in Los Angeles pursuant to a warrant issued after Whitmore's failure to appear. Whitmore denied his identity and had another person's driver's license in his pocket. This evidence was properly introduced to show flight and a guilty mind. *United States v. Alonzo*, 571 F.2d 1384 (5th Cir. 1978).

[4] Although Whitmore argues that the independent nonhearsay evidence against him is insufficient to link him to the conspiracy, we disagree. Whitmore's own statement to Gordon, as related in Gordon's testimony, provides proof of all of the essential elements of the conspiracy charged. Whitmore's statement, admissible against him as an admission of a party opponent under Fed.R.Evid. 801(d)(2)(A), clearly demonstrates the existence of a consensual agreement between Hill and the appellant. Whitmore's discussion with Gordon also establishes that Whitmore knew that Gordon worked for Hill in distributing heroin. By arranging to deal with Hill and then consummating this deal through Gordon, Whitmore joined the conspiracy. Granted, he may not have been one of the key members, but his role was sufficient to sustain his conviction. It was not neces-

sary for the government to prove that he participated in every aspect of the conspiracy, *United States v. Rodriquez*, 509 F.2d 1342 (5th Cir. 1975), so Gonsalves' testimony that Whitmore may not have been involved in the California aspects of the scheme cannot help Whitmore. Hill's statements to Gonsalves suggest that Whitmore had dealt previously with Hill, thus establishing continuity of the relationship.

D. Smith

The evidence against Smith came mainly from Cochran, an unindicted coconspirator who lived in an apartment rented from Smith. As mentioned earlier, Cochran had been involved with James in transporting heroin from Hill to Philadelphia early in 1974. She did not implicate Smith in that transaction.

Smith owned a home in Atlanta, and Cochran made several trips to Atlanta in 1974 to fix up Smith's house or to watch his children. On the last trip to which she referred, in November of 1974, she stayed at Smith's house for two weeks. Smith was present during at least part of this time. It was during this visit that Hill called Smith's home asking her if she had seen James. Hill also asked for Smith but he was not there. Hill called back three or four times and talked to Smith. Cochran heard Smith say that he had not seen James. Later Smith told her about his phone conversations with Hill. Hill had said that he had a "package" for James in Ohio which James was supposed to pick up. When James could not be located, Smith finally agreed to take the package himself. Cochran was to go to Ohio for it until Smith learned that Hill wanted $2,000 for it. Because Smith did not have the money in Atlanta, he called his daughter in Philadelphia and instructed her to get the money and go to Ohio for the package. Cochran said that she understood "package" to mean heroin.

Cochran also testified that she and one Earl worked for Smith in Philadelphia selling heroin from Smith's or her apartments, mostly to users. During Cochran's November visit to Atlanta, Earl called from Philadelphia and told her that they were out of "stuff," meaning heroin, in Philadelphia. Cochran told this to Smith.

On cross-examination Cochran was impeached on the basis of prior inconsistent statements made at the first trial. At that time, she had not been able to say when she had been in Atlanta. She was also a former heroin addict and she was granted immunity for her testimony.

Smith argues that the transaction with Hill was an afterthought and that it does not support the conclusion that he was a member of the conspiracy. Perhaps he was not—until then. But once he formed this agreement with Hill, he entered the conspiracy. He must have known about Hill's operation and that others, James, for example, were involved in it. In short, his conviction must stand.

III. Multiple Conspiracies

[5–7] The appellants, by isolating each of the transactions described above, argue that multiple conspiracies were proved rather than the one alleged in the indictment. This argument is without merit. The existence of multiple conspiracies is a fact question for the jury, *United States v. Becker, supra*, and there is ample support in the record for the jury's conclusion that the appellants were members of the one conspiracy alleged. Each appellant dealt with Hill or Gordon under circumstances which clearly demonstrated their knowledge of the fact that Hill's operation encompassed more than just Hill. Each member of the conspiracy need not be familiar with all of the details of the illegal scheme as long as he knows its general scope. Nor is it necessary for all of the co-conspirators to know each other or to work together on every transaction. *United States v. Rodriguez, supra.*

We are convinced that the government's proof sufficiently established that Hill's drug distribution operation was a unified scheme in which all appellants joined. The evidence showed overlapping membership in the various transactions and a centralized operation aimed at the specific objective of supplying drugs in large enough quantities and of a sufficient strength to permit further distribution. The jury was properly instructed on this issue, notwithstanding James' argument to the contrary. Because we hold that only one conspiracy existed, there was no error in denying the appellants' motions to sever.

IV. Miscellaneous

[8] Two other issues raised by James and Butler do not merit much discussion. They argue that the court erred in refusing to permit defense counsel to examine Cochran's arms for evidence of recent drug addiction. This restriction on cross-examination was not error for several reasons. First, testimonial cross-examination was adequate to impeach the witness, who readily admitted her prior drug addiction, including addiction during some of the incidents about which she testified. The jury was fully aware of this fact and was free to assess her credibility as it saw fit. Second, limitations on the extent of cross-examination lie within the sound discretion of the trial court, and no abuse of discretion has been shown. Third, defense counsel did not establish any qualification as experts in identifying recent drug addiction by an examination of an addict's arms.

[9] James and Butler also argue that the court erred in admitting records of telephone calls made from Smith's residence to Ohio because the records were not properly authenticated. This issue occupied a great deal of attention in the court below. The original records were destroyed as part of the telephone company's normal destruction policy, and no company employee was able to state from personal knowledge that the government's copy was a true and accurate copy of the originals. However, even if the authenticity of the records was not adequately established, admission of the records was harmless error as to James and Butler. Neither was a party to any phone calls from Smith's home, and Butler was not even mentioned in connection with any phone calls. The records related to outgoing calls and James was mentioned only in connection with incoming calls.[1] Hill had asked about James' whereabouts when he called Smith's residence, and Cochran's testimony clearly established this fact. We fail to see how the admission of the records could have harmed either appellant.

V. Coconspirator Statements

The final issue in this appeal requires us to consider the effect of the Federal Rules of Evidence upon the previous law regarding the allocation of the functions

1. At Smith's second trial the court refused to admit the records because the testimony relating to Ohio phone calls referred only to incoming calls, whereas the records related solely to calls made from Smith's house.

of judge and jury in determining the admissibility of extrajudicial statements under the so-called coconspirator exception to the hearsay rule. We expressly reserved decision on this issue in two recent cases because the issue had not been raised in the district court. *United States v. Hansen*, 569 F.2d 406 (5th Cir. 1978); *United States v. Tenorio*, 565 F.2d 943 (5th Cir. 1978). In this appeal, however, the appellants moved for a pretrial hearing outside the presence of the jury in order to permit the trial judge to determine the admissibility of coconspirator statements. In support of their motion, they argued that Rule 104(a) of the Federal Rules of Evidence allocated to the judge alone the responsibility for deciding the admissibility of such statements and that the complexity of their case called for this to be accomplished at a separate nonjury hearing, as permitted under Rule 104(c). The district court denied the motion, asserting that cautionary instructions of the kind required in *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973), would adequately protect the defendants. Faced with this denial of their motion, the defendants requested and received *Apollo* instructions at trial. They now ask us to reverse their convictions on the basis of the denial of their motion. We believe this is an appropriate opportunity to revisit *Apollo* and to establish the correct standard and procedure for handling the admissibility of coconspirator statements in criminal conspiracy trials. Applying this newly formulated standard to the appellants, we nonetheless affirm their convictions.

[10] Under a long-recognized exception to the hearsay rules, a statement made by one member of a conspiracy during the course of and in furtherance of the conspiracy may be used against other members of the conspiracy if certain conditions are met. Present practice calls for the judge and the jury to share the responsibility for determining whether these conditions have been met. We have held that the judge's role is to make a preliminary determination whether the government has presented sufficient evidence, independent of the hearsay itself, to support a finding by the jury that the alleged conspiracy existed and that the declarant and the defendant against whom the statement is offered were members of that conspiracy. This is the "prima facie case" standard enunciated in *United States v. Oliva*, 497 F.2d 130 (5th Cir. 1974), and followed in subsequent decisions. *See, e. g., United States v. Rodriguez*, 509 F.2d 1342 (5th Cir. 1975); *United States v. Tyler*, 505 F.2d 1329 (5th Cir. 1975). If the judge is satisfied that this test has been met, then under *Apollo* and other cases, the jury is instructed, both when the hearsay is introduced and at the final charge, that it may consider the hearsay as against a particular defendant only if it first finds that the conspiracy existed, that the declarant and the defendant were members of it, and that the statement was made during the course of and in furtherance of the conspiracy. *See, e. g., United States v. Lawson*, 523 F.2d 804 (5th Cir. 1975); *United States v. Fontenot*, 483 F.2d 315 (5th Cir. 1975); *Myers v. United States*, 377 F.2d 412 (5th Cir. 1967). However, the cases are uniformly silent on the standard which the jury is to apply to its initial determination. Apparently it is not uncommon for the jury to be instructed that it must find the existence of the conspiracy and the defendant's connection to it beyond a reasonable doubt before ever considering the coconspirator hearsay.[2] Obviously, this renders the hearsay totally superfluous, for, if we assume that the jury complied with the instructions, the hearsay evidence was not available to the jury until it had already found the defendant guilty beyond a reasonable doubt. This flows from the fact that the preliminary facts necessary for admissibility coincide with the ultimate facts necessary for conviction; *i. e.* the existence of the conspiracy and the membership of the accused in it.

[11] Under the Federal Rules of Evidence, which became effective July 1, 1975, a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed.R.Evid. 801(d)(2)(E). While this definitional section of the Rules removes coconspirator statements from the realm of hearsay, admissibility still depends upon the proof of the same facts as previously. Thus, there must be a conspiracy, the statement must be made during the course of and in furtherance of the conspiracy, and the declarant and the defendant must be members of the conspiracy.[3] However, Rule 801 provides no guidance on whether the judge or the jury is to decide that these conditions have been satisfied.

To resolve that question, we must look to Rule 104, which seeks to delineate the functions of judge and jury in the determination of preliminary questions of fact. The relevant portions of Rule 104 provide:

> (a) Questions of admissibility generally. Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> (c) Hearing of jury. Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused is a witness, if he so requests.

The rule thus adopts the orthodox position that the judge alone decides preliminary questions which relate to the competence of evidence and the jury decides preliminary questions which relate to the conditional relevancy of the evidence.[4]

The language of Rule 104 does not conclude our inquiry, however, for neither that rule nor the Advisory Committee's Notes informs us whether coconspirator's statements are to be dealt with under Rule 104(a) as questions of compe-

2. That was the instruction given in this case.

3. The Supreme Court has stated that the rationale behind the coconspirator rule is the notion that coconspirators are partners in crime and the law deems them agents of one another. The "in furtherance of the conspiracy" requirement is analogous to the agency theory of "in the scope of the agent's authority." *Anderson v. United States*, 417 U.S. 211, 94 S.Ct. 2253, 41 L.Ed.2d 20 (1974).

4. For an early yet authoritative explication of the orthodox rule and its variations, *see* E. Morgan, *Functions of Judge and Jury in the Determination of Preliminary Questions of Fact*, 43 Harv.L.Rev. 165 (1929).

tence or under Rule 104(b) as questions of conditional relevancy.[5] As Weinstein has observed,

> The problem can, on the one hand, be characterized as a matter of competence of the evidence—i. e. is the probability of its reliability sufficiently great to make it admissible? Viewed from this perspective the preliminary issue of the existence of the conspiracy and the objectioning defendant's part in it are questions for the judge to decide like any other question of hearsay or privilege.
>
> But, on the other hand, the issue can be framed in relevancy terms where the question of admissibility turns on the relevancy of the evidence. Thus declarations of a coconspirator, while often interesting, are largely irrelevant to any issue of defendant's guilt unless he is first shown to be connected with the conspiracy. Preliminary questions regarding relevance are frequently held to be for the jury after the introduction of sufficient evidence to justify a jury finding the existence of the preliminary fact.

M. Berger & J. Weinstein, Weinstein's Evidence ¶ 104[05] at 104–40 (1975).

Clearly we must look beyond the language of Rule 104 to its underlying policies in order to determine who should decide the preliminary questions and what standard of proof should control the decision on admissibility. This inquiry begins with a recognition that the danger sought to be avoided is the prejudice to the defendant which would result if the jury were to rely upon coconspirator statements without first addressing and deciding the admissibility question. It was this same danger which motivated the Supreme Court to hold in *Jackson v. Denno*, 378 U.S. 368, 391, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that a criminal defendant was entitled to have a "reliable and clear-cut determination of the voluntariness of [his] confession, including the resolution of disputed facts upon which the voluntariness issue may depend," made by someone other than the jury which was to determine his guilt or innocence.[6] The Court was concerned that the jury's determination of voluntariness would be influenced by its belief that the confession, even though coerced, was true. A procedure which permitted the same jury to resolve both the voluntariness issue and the defendant's ultimate guilt left an appellate court unable to determine how the jury had resolved these issues. Expressing the view that a jury simply could not perform the two-step analysis without being swayed by the content of the confession, the Court refused to "assume that [the issues] were reliably and properly resolved against the accused." *Id.* at 387, 84 S.Ct. at 1786.

The same risk of prejudice to the defendant against whom coconspirator statements are proffered calls for a procedure which will minimize the possibility of a conviction based even in part on inadmissible evidence. We believe that it is unrealistic to assume that a jury will always engage in the two-step process of determining admissibility and then guilt. It is entirely likely that the jury will be so affected by the content of the very statements whose admissibility they are considering that the issue of admissibility will never actually and finally be resolved. Nor is a defendant adequately protected by the judge's preliminary determination that the government's proof is adequate to support a jury finding of the fulfillment of all of the conditions. This was the practice challenged in *Jackson v. Denno, supra*, with regard to confessions. Yet the Supreme Court found it no substitute for an actual, full, clear-cut, and reliable determination.

We are convinced that the preliminary questions of conditional relevancy envisioned by Rule 104(b) are those which, by their very nature, present no such danger of prejudice to the defendant. They are questions of probative force rather than evidentiary policy. They involve simple factual questions which the jury, with its own common sense, can answer as capably as the trial judge. In such situations an instruction to disregard the evidence if the condition upon which relevancy depends is not met merely reinforces the jury's own natural inclination to ignore what it considers irrelevant. For example, the Advisory Committee's Notes refer to the admissibility of a letter which would only be relevant to an issue at trial if the party had written or authorized it. If the jury concludes that the party did neither, the letter is of no concern to them.

The admissibility of a coconspirator's declarations, however, does not present a question of relevancy conditioned on fact which can be properly treated under Rule 104(b). Rather the admissibility of such statements must be evaluated by the trained legal mind. Moreover, coconspirator statements pose problems precisely because they are relevant. Indeed, such evidence endangers the integrity of the trial because the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, though he be instructed to disregard the statements or to consider them conditionally.

Courts have long recognized the logical dilemmas inherent in setting a standard for admissibility of coconspirators' declarations. *See, e. g., Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963). Judicial development of this area of the law variously has sought to resolve conflicting needs to avoid unjustifiably prejudicing the defendant's case with untrustworthy evidence, to prevent purposeless exclusion of evidence relevant to the government's case, and to refrain from freighting the jury with instructions difficult to follow. Every effort to accommodate these goals has recognized that a court must set threshold requirements for proof of the existence of the conspiracy and the connection of the defendant and the declarant with the conspiracy before the jury may consider the declarations in arriving at a verdict. Although this threshold determination is always close to and often coincident with the ultimate question, it is an assay that must be made to prevent the admission of untrustworthy, prejudicial evidence.

Rule 104 has now made it clear that we must revise the procedures adopted in *Apollo* for testing the trustworthiness of coconspirator statements—that is for determining whether the conspiracy existed and whether the defendant and the declarant were members of it. Because the Rule 104(b) exception is inappropriate to test the admissibility of such declarations, we hold that Rule 104(a) re-

5. *Compare* L. Kessler, *The Treatment of Preliminary Issues of Fact in Conspiracy Litigations: Putting the Conspiracy Back into the Coconspirator Rule*, 5 Hofstra L.Rev. 77 (1976), *with* P. Bergman, *The Coconspirator's Exception: Defining the Standard of the Independent Evidence Test under the New Federal Rules of Evidence*, 5 Hofstra L.Rev. 99 (1976).

6. The Court said that the preliminary determination of the voluntariness of the confession could be made by the trial judge, another judge, or another jury. Rule 104(c) now requires hearings on the admissibility of confessions to be conducted out of the hearing of the jury.

quires that the judge alone make the threshold determination of the admissibility of the evidence.[7]

The jury is to play no role in determining the admissibility of the statements. This accords with the decisions of the Court of Appeals for the First Circuit in *United States v. Petrozziello*, 548 F.2d 20 (1st Cir. 1977), and *United States v. Martorano*, 557 F.2d 1 (1st Cir. 1977), which expressly held that Rule 104(a) controls the question of admissibility, and with decisions of other circuits which held even before the adoption of the Federal Rules of Evidence that the judge alone must determine the admissibility of coconspirator statements. *See, e. g., United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1964); *Carbo v. United States*, 314 F.2d 718 (9th Cir. 1963). Our holding is also supported by dictum in *United States v. Nixon*, 418 U.S. 683, 701 n.14, 94 S.Ct. 3090, 3104, 41 L.Ed.2d 1039 (1974), where the Supreme Court stated: "Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge."

Because the trial court is vested with the sole responsibility for determining the questions of fact for admissibility of coconspirator statements, the standard by which it makes this determination is to be high enough to afford adequate protection to the defendant against whom the evidence is offered, yet not so high as to exclude trustworthy relevant evidence. Therefore, we hold that coconspirator statements are admissible if the trial judge is convinced by a preponderance of the evidence that the conspiracy existed, that the defendant and the declarant were members of it, and that the statements were made in the course of and in furtherance of the conspiracy.[8]

[12] Rule 104(a) provides that the court "is not bound by the rules of evidence except those with respect to privileges." However, we do not construe this provision as permitting the court to rely upon the content of the very statement whose admissibility is at issue. Rather, we adhere to our current requirement that fulfillment of the conditions of admissibility must be established from evidence independent of the coconspirator statements themselves. Only by requiring independent evidence to form the basis for admissibility will there be sufficient corroboration of the reliability of the statements. So while the court may look at other inadmissible evidence as well as admissible and admitted proof in making its determination, the actual disputed statements themselves may form no part of the basis for that determination. This construction of Rule 104(a) comports with earlier Supreme Court pronouncements that admissibility must depend upon independent evidence

7. Dictum in *United States v. Ochoa*, 564 F.2d 1155 (5th Cir. 1977), suggests that subsection (b) is the appropriate portion of the rule. However, the question of the effect of the Rules of Evidence upon our present practice had not been raised at trial and we did not fully explore the issue. We do not consider ourselves bound by the dictum, particularly since three recent cases specifically alluded to the effect of Rule 104(a) and left the question open. *United States v. Hansen*, 569 F.2d 406, 410 n.1 (5th Cir. 1978); *United States v. Tenorio*, 565 F.2d 943, 945 (5th Cir. 1978). *See also United States v. Dominquez*, 573 F.2d 366, 367 (1978); *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977).

8. This is the standard adopted by the courts of appeals for the first and second circuits, *United States v. Petrozziello, supra*, and *United States v. Geaney, supra*. Weinstein, *supra*, at 104-44, suggests the criminal standard of proof beyond a reasonable doubt. The Ninth Circuit has adopted a prima facie case standard, *Carbo v. United States, supra*.

in order to prevent the statement from lifting itself "by its own bootstraps to the level of competent evidence." *Glasser v. United States*, 315 U.S. 60, 75, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942). *See also United States v. Nixon*, 418 U.S. 683, 701 n.14, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974) (substantial independent evidence required).

[13] The displacement of *Apollo* by Rule 104(a) must necessarily affect the order of proof at trial in most cases; otherwise defendants would face a danger of prejudice like that risked under *Apollo*. Under *Apollo*, the jury could hear coconspirator declarations with an appropriate instruction before admissibility was fully resolved. On defendant's motion at the close of the government's case, the judge could strike the testimony if no reasonable jury could find the defendant guilty beyond a reasonable doubt based on the nonhearsay evidence alone. If the judge was of the opinion that the evidence should be struck, he would also have to grant a motion to acquit, because under *Apollo* these motions presented coincident questions of fact. Under Rule 104(a), however, unless the trial judge rules preliminarily on the admissibility of coconspirators' declarations, the new rule would retain the weakness of *Apollo*. The jury would still hear declarations of undetermined trustworthiness. If at the close of the government's case the declarations should turn out to be inadmissible, the judge would have to instruct the jury to perform the intellectually difficult task of deciding the case while disregarding prejudicial evidence of striking relevance—a job no less demanding than reaching a preliminary finding under *Apollo*. Therefore, under Rule 104 the court must not admit coconspirators' declarations until it has determined that the government has made the required threshold showing.

Thus, Rule 104 will affect the discretion accorded the trial judge under Fed. R.Evid. 611 to control the order of proof at trial, because the judge cannot allow the jury to hear a coconspirator's declaration until he has determined admissibility by a preponderance of the evidence. If the prosecution should seek to introduce a coconspirator's declaration early in the trial, sufficient evidence to support the threshold finding may not have come in. Thus, the government must either develop its proof of conspiracy and the defendant's and the declarant's connection with it before tendering a coconspirator statement or make such proof at an extrajury hearing. Discretion may well dictate that the development of lengthy proof to make such a declaration admissible occur only once. Because the matter is essential to the proof of any conspiracy charge and must eventually be heard by the jury, the judge may require that an early tender of a coconspirator's declaration be deferred until the requisite threshold showing has been made, rather than requiring the government to make its proof initially at an extrajury hearing.

[14] Rule 104(c) contains one express limit: hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. The Rule does not indicate specifically what other determinations need be so made, but provides generally for other determinations to be out of the hearing of the jury "when the interests of justice require." The Advisory Committee stated that detailed treatment of when preliminary matters should be heard outside the hearing of the jury was not feasible. Their Notes to Subdivision (c) suggest that the court may save time by taking

foundation proof in the presence of the jury where the evidence on preliminary questions, though not relevant to jury issues, may be heard by the jury with no adverse effect. This rationale cannot apply to coconspirators' declarations because they present serious dangers of confusion and prejudice. Therefore, we hold that, under Rule 104(c), justice requires that the determination of the admissibility of coconspirators' declarations and any hearings necessary for the judge to make that determination by a preponderance of the evidence be conducted outside the presence of the jury.

[15] If the court is satisfied that the statements are admissible, then they are to be considered by the jury along with the other competent evidence in determining the defendant's guilt or innocence. "To accept the problem as one of admissibility of evidence is to recognize that the declarations, if admissible, shall be considered by the jury *in reaching* its determination upon the issue of innocence or guilt." *Carbo v. United States*, 314 F.2d 718, 736 (9th Cir. 1963). Thus, once the trial court has determined out of the hearing of the jury that the statements are admissible, the jury is not to be instructed to make its own determination of admissibility.

Nothing in the procedure which we announce here deprives a defendant of a trial by jury. The judge is ruling solely on admissibility of evidence.[9] The guilt or innocence of the defendant must, of course, remain a question for the jury to be decided beyond a reasonable doubt.

[16] Applying this standard to the appellants here as a matter of law, we are convinced by a preponderance of the independent evidence that the conspiracy existed, that each of the defendants and appellants were members of it, and that the statements were made in the course of and in furtherance of the conspiracy.

AFFIRMED.

9. We would note that Rule 104 does deprive the defendant of one significant safeguard which *Apollo* procedures vouchsafed. If the defendant made a motion to strike the hearsay testimony at the conclusion of all the proof, *Apollo* would have required that the hearsay be tested by whether a jury could find that proof beyond a reasonable doubt exclusive of the declarations established the elements of admissibility. The practice under Rule 104 will differ. Because admissibility has been judicially decided, the most a judge would do would be to reexamine his prior determination for error in applying the standard. Moreover, any concurrent motion for a judgment of acquittal will weigh all the proof including the declarations which have been allowed.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

UNITED STATES of America, Plaintiff-Appellee,

v.

Donald JAMES and David Anthony Butler, Defendants-Appellants.

UNITED STATES of America, Plaintiff-Appellee,

v.

Henry SMITH and Kenneth Wayne Whitmore, Defendants-Appellants.

Nos. 77-5188, 77-5271.

United States Court of Appeals, Fifth Circuit.

Feb. 12, 1979.

Defendants were convicted in the United States District Court for the Northern District of Georgia, Charles A. Moye, Jr., J., of conspiracy to possess heroin and cocaine with intent to distribute, and the conviction was affirmed by the Court of Appeals in a panel decision, 576 F.2d 1121. On reconsideration, the Court en banc, Charles Clark, Circuit Judge, held, inter alia, that it is for the judge alone to make the determination whether out-of-court statements by alleged coconspirators are admissible in evidence in a criminal trial.

Affirmed.

Gee, Circuit Judge, concurred specially and filed opinion.

1. Criminal Law ⇐423(1), 427(2)

In order for out-of-court statement by alleged coconspirators to be admissible during criminal prosecution of one such conspirator, proof must be made that there was conspiracy and that statement was made during course and in furtherance thereof, and declarant and defendant must be members of conspiracy. Fed.Rules Evid. rule 801(d)(2)(E), 28 U.S.C.A.

2. Criminal Law ⇐736(1)

Under Federal Rules of Evidence, judge alone decides preliminary questions as to competence of evidence and jury decides preliminary questions as to conditional relevancy of evidence. Fed. Rules Evid. rule 104, 28 U.S.C.A.

3. Criminal Law ⇐736(1)

Under Federal Rule of Evidence delineating functions of judge and jury in determination of preliminary questions of fact, preliminary questions of conditional relevance are those which present no danger of prejudice to defendant, questions of probative force rather than evidentiary policy, and questions as to fulfillment of factual conditions which jury must answer. Fed.Rules Evid. rule 104(b), 28 U.S.C.A.

4. Criminal Law ⇐736(1)

Federal Rules of Evidence require that judge alone make determination of admissibility of out-of-court statements by alleged coconspirators in conspiracy trial, and jury is to play no role in determining admissibility of such statements, overruling *United States v. Apollo*, 476 F.2d 156. Federal Rules Evid. rule 104, 28 U.S.C.A.

5. Criminal Law ⇐427(2, 5)

In conspiracy prosecution, declaration by one defendant is admissible against other defendants only when there is sufficient showing, by independent evidence, of conspiracy among one or more of the defendants and declarant and that declaration at issue was in fur-

therance of conspiracy; as preliminary matter, there must be substantial independent evidence of conspiracy at least enough to take question to jury. Fed. Rules Evid. rules 104, 104(a c), 801, 801(d)(2)(E), 28 U.S.C.A.

6. Criminal Law ⇐427(5)

Despite provision of Federal Rules of Evidence that court is not bound by rules of evidence except those with respect to privilege when determining preliminary questions concerning admissibility of evidence, court, when determining whether out-of-court statements by alleged coconspirators are admissible in evidence in conspiracy prosecution, will not be permitted to rely upon content of very statement whose admissibility is at issue; rather, fulfillment of conditions of admissibility must be established by evidence independent of coconspirator's statement itself. Fed.Rules Evid. rule 104(a), 28 U.S.C.A.

7. Criminal Law ⇐427(2, 3)

When out-of-court statement of alleged coconspirator is offered in evidence in conspiracy prosecution, court should, whenever reasonably practicable, require showing of conspiracy and of connection of defendant with it before admitting declaration of coconspirator; if court determines it is not reasonably practical to require showing to be made before admitting evidence, court may admit statement subject to being "connected up." Fed.Rules Evid. rule 104, 28 U.S.C.A.

8. Criminal Law ⇐428

Regardless of whether preliminary proof of admissibility of out-of-court statements by alleged coconspirator has been made in preferred order during conspiracy trial, or whether coconspirator's statement has instead been admitted subject to later connection, court must determine as factual matter, on appropriate motion at conclusion of all evidence, whether prosecution has shown by preponderance of evidence independent of statement itself that conspiracy existed, that coconspirator and defendant against whom coconspirator's statement is offered were members of conspiracy, and that statement was made during course of and in furtherance of conspiracy; if court concludes that prosecution has not borne its burden of proof on such issues, statement cannot remain in evidence to be submitted to jury and judge must decide whether prejudice arising from erroneous admission of statements can be cured by cautionary instruction or whether mistrial is required. Fed.Rules Evid. rule 801(d)(2)(E), 28 U.S.C.A.

9. Criminal Law ⇐428

Nothing stated in court's declaration of new rule concerning procedure for establishing admissibility of out-of-court statements by alleged coconspirators in conspiracy trial would prevent trial judge from requiring more meticulous procedures to assure that such statements are not admitted until properly authenticated by substantial independent evidence and do not remain in proof to be submitted to jury unless their admissibility is established by preponderance of evidence. Fed.Rules Evid. rules 104, 801(d)(2)(E), 28 U.S.C.A.

10. Criminal Law ⇐427(5)

Admission in drug conspiracy prosecution of out-of-court statements by alleged coconspirator was fully supported where there was preponderance of independent evidence that conspiracy existed, that each defendant was member of it, and that statements were made in course of and in furtherance of conspiracy. Fed.Rules Evid. rule 104, 28 U.S.C.A.

11. Courts ⇐100(1)

Newly declared rule concerning manner of establishing admissibility of out-of-court statements by alleged coconspirators in conspiracy prosecution would apply only prospectively to coconspirator's statements which Government sought to introduce in trials commencing after 30 days from date of court's opinion. Fed.Rules Evid. rule 104, 28 U.S.C.A.

Appeals from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, COLEMAN, GOLDBERG, AINSWORTH, GODBOLD, CLARK, RONEY, GEE, TJOFLAT, HILL, FAY, RUBIN, and VANCE, Circuit Judges.*

CHARLES CLARK, Circuit Judge:

The court en banc on its own motion has reconsidered this case following the panel decision reported at 576 F.2d 1121 because of possible conflicts between that decision and prior decisions of this court touching on the admission of out-of-court statements by alleged coconspirators and because of the importance of the question at issue.

The panel opinion fully stated the facts and circumstances of the case and the conclusion of the court with respect to all matters at issue through that part of the opinion denominated "IV. Miscellaneous," 576 F.2d 1123–27, second line. The court en banc, therefore, approves and adopts those parts of the panel opinion for the purpose of dealing with the matters discussed. The remainder of the panel opinion denominated "V. Coconspirator Statements" is withdrawn and the following is substituted in its place:

V. *Coconspirator Statements*

Under a long-recognized exception to the hearsay rule, a statement made by one member of a conspiracy during the course of and in furtherance of the conspiracy may be used against other members of the conspiracy if certain conditions are met. Meeting these conditions is necessary because of the court's recognition of the danger of prejudice to the defendant which would result if the jury were to rely upon coconspirator statements without first addressing and deciding the admissibility question.

(A) *Judge or Jury?*

Present practice calls for the judge and the jury to share the responsibility for determining whether these conditions have been met. In *United States v. Apollo*, 476 F.2d 156 (5th Cir. 1973), we held that the judge's role is to make a preliminary determination whether the government has presented sufficient evidence, independent of the hearsay itself, to support a finding by the jury that the alleged conspiracy existed and that the declarant and the defendant against whom the statement is offered were members of that conspiracy. This is the "prima facie case" standard enunciated in *United States v. Oliva*, 497 F.2d 130 (5th Cir. 1974), and followed in subse-

* Judge Tuttle was a member of the panel, the author of the panel opinion, and, as a member of the en banc court as he was qualified to be, 28 U.S.C.A. § 46(c), participated in the oral argument of the case en banc and the en banc conference. Subsequently, the Omnibus Judgeship Bill, Public Law No. 95-486 (95th Congress) was approved October 20, 1978. In view of this, Judge Tuttle elected not to participate further in this decision. Judge Thornberry, also a member of the en banc court, took senior status after the oral argument and en banc conference. He, too, elected not to participate further in this decision.

quent decisions *see, e. g., United States v. Rodriguez,* 509 F.2d 1342 (5th Cir. 1976); *United States v. Tyler,* 505 F.2d 1329 (5th Cir. 1975). If the judge is satisfied that this test has been met, then under existing law the jury is instructed, both when the hearsay is introduced and at the final charge, that it may consider the hearsay against a particular defendant only if it first finds that the conspiracy existed, that the declarant and the defendant were members of it, and that the statement was made during the course of and in furtherance of the conspiracy. *See, e. g., United States v. Lawson,* 523 F.2d 804, 806 (5th Cir. 1976); *United States v. Fontenot,* 483 F.2d 315, 324–25 (5th Cir. 1973); *Myers v. United States,* 377 F.2d 412, 417–19 (5th Cir. 1967).

This case presents the first opportunity for us to consider the effect of the Federal Rules of Evidence upon our present practice.[1] Here, the appellants moved for a pretrial hearing outside the presence of the jury in order to permit the trial judge to determine the admissibility of coconspirator statements. . In support of their motion, they argued that Rule 104(a) of the Federal Rules of Evidence allocated to the judge alone the responsibility for deciding the admissibility of such statements and that the complexity of their case called for this to be accomplished at a separate nonjury hearing, as permitted under Rule 104(c). The district court denied the motion, asserting the cautionary *Apollo* instructions would adequately protect the defendants. Faced with this denial of their motion, the defendants requested and received *Apollo* instructions at trial. They now ask us to reverse their convictions on the basis of the denial of their motion. We believe this is an appropriate opportunity to overrule *Apollo* and to establish a new standard and procedure for handling the admissibility of coconspirator statements in criminal conspiracy trials.

[1] Under the Federal Rules of Evidence, which became effective July 1, 1975, a statement is not hearsay if it is offered against a party and is "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy." Fed.R.Evid. 801(d)(2)(E). While this definitional section of the Rules removes coconspirator statements from the realm of hearsay, admissibility still depends upon the proof of the same facts as required previously. Thus, there must be a conspiracy, the statement must be made during the course of and in furtherance of the conspiracy, and the declarant and the defendant must be members of the conspiracy.[2] However, Rule 801 provides no guidance on whether the judge or the jury is to decide that these conditions have been satisfied.

1. We expressly reserved the decision on this issue in two recent cases because the issue had not been raised in the district court, *United States v. Hansen,* 569 F.2d 406, 401 n.1 (5th Cir. 1978); *United States v. Tenorio,* 565 F.2d 943, 945 (5th Cir. 1978). These cases were decided after *United States v. Ochoa,* 564 F.2d 1155 (5th Cir. 1977), also a case in which the issue had not been raised below, but in which the court stated that Rule 104(b) instead of 104(a) left the admissibility question to the jury.

2. The Supreme Court has stated that the rationale behind the coconspirator rule is the notion that coconspirators are partners in crime and the law deems them agents of one another. The "in furtherance of the conspiracy" requirement is analogous to the agency theory of "in the scope of the agent's authority." *Anderson v. United States,* 417 U.S. 211, 218 n.6, 94 S.Ct. 2253, 2259 n.6, 41 L.Ed.2d 20, 29 n.6 (1974).

[2] To resolve that question, we must look to Rule 104, which delineates the functions of judge and jury in the determination of preliminary questions of fact. The relevant portions of Rule 104 provide:

> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualifications of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.
>
> (b) *Relevancy conditioned on fact.* When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.
>
> (c) *Hearing of jury.* Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or, when an accused be a witness, if he so requests.

The rule thus adopts the orthodox position that the judge alone decides preliminary questions as to the competence of evidence, and the jury decides preliminary questions as to the conditional relevancy of the evidence.

The language of Rule 104 does not conclude our inquiry, however, for neither that rule nor the Advisory Committee's Notes inform us whether coconspirator's statements are to be dealt with under Rule 104(a) as questions of admissibility or under Rule 104(b) as questions of conditional relevancy.

We must look beyond the language of the rule to its underlying policies to determine who should decide the preliminary questions and what standard of proof should control the decision on admissibility. A rule that puts the admissibility of coconspirator statements in the hands of the jury does not avoid the danger that the jury might convict on the basis of these statements without first dealing with the admissibility question. It was this same danger which motivated the Supreme Court to hold in *Jackson v. Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908 (1964), that a criminal defendant is entitled to have a "reliable and clear-cut determination of the voluntariness of [his] confession, including the resolution of disputed facts upon which the voluntariness issue may depend," made by someone other than the jury which is to determine his guilt or innocence.[3] *Id.* at 391, 84 S.Ct. at 1788, 12 L.Ed.2d at 924.

[3] We are therefore convinced that the preliminary questions of conditional relevance envisioned by Rule 104(b) are those which present no such danger of prejudice to the defendant. They are questions of probative force rather than evidentiary policy. They involve questions as to the fulfillment of factual conditions which the jury must answer.

The admissibility of a coconspirator's declarations in a conspiracy trial, however, does pose problems precisely because they are relevant. Such evidence endangers the integrity of the trial be-

3. The Court said that the preliminary determination of the voluntariness of confession could be made by the trial judge, another judge, or another jury. *Jackson, supra,* 378 U.S. at 391 n.19, 84 S.Ct. at 1788 n.19, 12 L.Ed.2d at 924 n.19. Rule 104(c) now requires that hearings on the admissibility of confessions be conducted out of the hearing of the jury.

cause the relevancy and apparent probative value of the statements may be so highly prejudicial as to color other evidence even in the mind of a conscientious juror, despite instructions to disregard the statements or to consider them conditionally. As a result, such statements should be evaluated by the trained legal mind of the trial judge.

[4] Rule 104 has now made it clear that we must revise the procedures adopted in *Apollo* for testing the trustworthiness of coconspirator statements—that is for determining whether a conspiracy existed and whether the defendant and the declarant were members of it. Because the Rule 104(b) exception is inappropriate to test the admissibility of such declarations, we hold that Rule 104(a) requires that the judge alone make the determination of the admissibility of the evidence. The jury is to play no role in determining the admissibility of the statements.

The United States, in its brief and on oral argument, urges this court to replace the *Apollo* rule by construing the Rules of Evidence in such a manner as would place the duty to make this determination upon the judge rather than the jury. In reaching this conclusion, we also find ourselves in accord with the courts of appeals of all of the circuits which have addressed the issue. Some of these courts have based such conclusion on their interpretation of the Federal Rules of Evidence. *See, e. g., United States v. Enright,* 579 F.2d 980, 982–87 (6th Cir. 1978); *United States v. Bell,* 573 F.2d 1040, 1043–1045 (8th Cir. 1978); *United States v. Martorano,* 557 F.2d 1, 11–12 (1st Cir. 1977); and *United States v. Petrozziello,* 548 F.2d 20, 22 24 (1st Cir. 1977). Other circuits reached the same result prior to the adoption of the Federal Rules. *See, e. g., United States v. Weiner,* 578 F.2d 757, 767–72 (9th Cir. 1978); *United States v. Stanchich,* 550 F.2d 1294, 1298–99 (2d Cir. 1977); *United States v. Trowery,* 542 F.2d 623 (3d Cir.), *cert. denied,* 429 U.S. 1104, 97 S.Ct. 1132, 51 L.Ed.2d 555 (1976); *United States v. Jones,* 542 F.2d 186, 202–208 (4th Cir.), *cert. denied,* 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 375 (1976); *United States v. Geaney,* 417 F.2d 1116, 1119–21 (2d Cir. 1969). The other circuits, the Seventh, the Tenth, and the District of Columbia, have not yet decided what effect the new rules have in this field of the law. *See, e. g., United States v. Haldeman,* 181 U.S.App.D.C. 254, 341 n.247, 559 F.2d 31, 118, n.247 (1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977).

(B) *By What Standard?*

Under our *Apollo* rule, the trial judge had to determine whether the prima facie test had been met before permitting the jury to consider the statement. In *United States v. Oliva, supra,* we described this test as "whether the government, by evidence independent of the hearsay declarations of the coconspirator, has established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is whether the other evidence *aliunde* the hearsay would be sufficient to support a finding by the jury that the defendant was himself a conspirator." 497 F.2d at 133.

It must be borne in mind that the prima facie test was used when the jury also had a part in determining the use of the statements under the *Apollo* ruling. This court has not spoken on the standard which the jury was to apply to this determination. Apparently it was not uncommon for the jury to be instructed that it must find the existence of the

conspiracy and the defendant's connection to it beyond a reasonable doubt before ever considering the coconspirator statement.

Since we now conclude that the trial court has the responsibility for determining those questions of fact relating to admissibility of the statement, the standard by which the court makes this determination should be high enough to afford adequate protection to the defendant against whom the evidence is offered, yet not so high as to exclude trustworthy, relevant evidence.

A statement by the Supreme Court in *United States v. Nixon,* 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), although dictum, supports the principle that the standard must be one that requires the trial judge to find at least enough evidence touching on the critical issues to support a jury verdict. The Court said:

> Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, [14] of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy.

Id. at 701, 94 S.Ct. at 3104, 41 L.Ed.2d at 1060. Footnote 14 in turn contains the significant language:

> As a preliminary matter, there must be *substantial, independent* evidence of a conspiracy, at least enough to take the question to the jury. . . . Whether the standard has been satisfied is a question of admissibility of evidence to be decided by the trial judge.

Id. at 701 n.14, 94 S.Ct. at 3104 n.14, 41 L.Ed.2d at 1060 n.14. (Emphasis added) (citations omitted).

There is some confusion resulting from the use of the terms by the several courts of appeals to describe the quantum of proof necessary for the trial judge to admit a coconspirator's statement. Some courts use the "prima facie" standard; others refer to a "fair preponderance" of the evidence. Still others require "substantial independent evidence.[4]"

[5] Because of our conclusion, discussed below, that the trial court's threshold determination of admissibility is normally to be made during the presentation of the government's case in chief and before the evidence is heard by the jury, it is more appropriate to adopt a "substantial" evidence rule rather than

4. In *United States v. Ross,* 321 F.2d 61, 68 (2d Cir.), *cert. denied,* 375 U.S. 894, 84 S.Ct. 170, 11 L.Ed.2d 123 (1963), the Court applied the "preponderance" test, but then stated that the required proof was "not as high as the amount needed to warrant submission of a conspiracy charge to the jury." This standard has been restated most recently for the Court of Appellees for the Second Circuit in *United States v. Stanchich,* 550 F.2d 1294, 1299 n.4 (2d Cir. 1977), and *United States v. Geaney,* 417 F.2d 1116, 1119 (2d Cir. 1969).

The Court of Appeals for the Third Circuit adopted the "preponderance" phrase as its standard, citing *Geaney,* but it construed the standard as "more severe than the prima facie standard," *United States v. Trotter,* 529 F.2d 806, 812 (3d Cir. 1976). The standards applied by other circuits can be understood by reference to the following cases: *United States v. Enright,* 579 F.2d 980 (6th Cir. 1978); *United States v. Bell,* 573 F.2d 1040 (8th Cir. 1978); *United States v. Martorano,* 557 F.2d 1 (1st Cir. 1977); *United States v. Haldeman,* 181 U.S.App.D.C. 254, 559 F.2d 31 (1976), *cert. denied,* 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977); *United States v. Jones,* 542 F.2d 186 (4th Cir.), *cert. denied,* 426 U.S. 922, 96 S.Ct. 2629, 49 L.Ed.2d 375 (1976).

one which requires, at that stage of the proceedings, a "preponderance" of the evidence. We conclude that, as stated by the court in *Nixon, supra*, a declaration by one defendant is admissible against other defendants only when there is a "sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy," 418 U.S. at 701, 94 S.Ct. at 3104, 41 L.Ed.2d at 1060, and that "as a preliminary matter, there must be *substantial, independent* evidence of a conspiracy at least enough to take the question to the jury." *Id.* at 701 n.14, 94 S.Ct. at 3104 n.14, 41 L.Ed.2d at 1060 n.14. (emphasis added).

[6] Although Rule 104(a) provides that the court "is not bound by the Rules of Evidence except those with respect to privileges" we do not construe this language as permitting the court to rely upon the content of the very statement whose admissibility is at issue. We adhere to our requirement established in *Apollo* that fulfillment of the conditions of admissibility must be established by evidence independent of the coconspirator statement itself. This construction of Rule 104(a) comports with earlier Supreme Court pronouncements that admissibility must depend upon independent evidence in order to prevent this statement from "lift[ing] itself by its own boot straps to the level of competent evidence." *Glasser v. United States*, 315 U.S. 60, 75, 62 S.Ct. 457, 467, 86 L.Ed. 680, 701 (1942); *see Nixon, supra*.

(C) *Order of Proof.*

The displacement of *Apollo* by the rule we now announce may affect the order of proof at trial in some cases. In our discussion above, we identify the danger to a defendant in a conspiracy trial when the government tenders a coconspirator's statement before laying the foundation for its admission. Courts have on occasion allowed such statements to be heard by the jury upon the promise that the prosecutor will "connect it up." Of course, if it is connected up, the defendant suffers no prejudice in the order of proof. If, however, the judge should conclude at the end of the trial that the proper foundation has not been laid, the defendant will have been prejudiced from the jury's having heard the inadmissible evidence.

While the government here urges that the practice of "connecting up" be permitted to continue at the discretion of the trial judge, it suggests a remedy for failure to make the connection which may be more burdensome and expensive of prosecutorial and judicial effort than a reordering of the proof. The government suggests that "should the trial judge determine that the government has not carried its burden in connecting the previously admitted evidence, the court may 'upon appropriate motion, declare a mistrial, unless a cautionary instruction to disregard the statement would suffice to cure any prejudice.' *U. S. v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *U. S. v. Stanchich*, 550 F.2d 1294, 1298 (2d Cir. 1977)." Brief for the United States at 27. In *Stanchich* the court quoted from its prior decision in *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969), which required the judge, who has concluded that the statement has not been connected, to "instruct the jury to disregard the hearsay, or, when this was so large a proportion of the proof as to render a cautionary instruction of *doubtful* utility . . ., declare a mistrial if the defendant asks for it." 417 F.2d at 1120 (emphasis added).

The Court of Appeals for the Eighth Circuit has included a preferential course of action in its interpretation of the new rules dealing with the admission of such evidence. In *United States v. Macklin*, 573 F.2d 1046 (8th Cir. 1978), after stating that the new rule "does not alter the traditional discretion of the trial judge to allow the government to place the statement into evidence on the condition that it be later shown" to be connected, stated:

> [I]t is preferable whenever possible that the government's independent proof of the conspiracy be introduced first, thereby avoiding the *danger*, recognized in *Petrozziello* of injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes.

573 F.2d at 1049, n.3 (emphasis added).

In *Petrozziello, supra*, the court said in a footnote:

> The judge insisted that the government present all its non-hearsay first. He then decided whether that evidence permitted reliance on the co-conspirator exception. Nothing in the new rules or this opinion requires that the judge's meticulous approach be abandoned. Although time-consuming, it avoids the *danger* that hearsay will be admitted in anticipation of a later showing of conspiracy that never materializes.

548 F.2d at 23 n.3 (emphasis added).

[7] Both because of the "danger" to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency when a mistrial is required in order to obviate such danger, we conclude that the present procedure warrants the statement of a preferred order of proof in such a case. The district court should, whenever reasonably practicable, require the showing of a conspiracy and of the connection of the defendant with it before admitting declarations of a coconspirator. If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected up.

(D) *At the End of the Trial.*

[8] Regardless of whether the proof has been made in the preferred order, or the coconspirator's statement has been admitted subject to later connection, on appropriate motion at the conclusion of all the evidence the court must determine as a factual matter whether the prosecution has shown by a preponderance of the evidence independent of the statement itself (1) that a conspiracy existed, (2) that the coconspirator and the defendant against whom the coconspirator's statement is offered were members of the conspiracy, and (3) that the statement was made during the course and in furtherance of the conspiracy. Rule 801(d)(2)(E). If the court concludes that the prosecution has not borne its burden of proof on these issues, the statement cannot remain in the evidence to be submitted to the jury. In that event, the judge must decide whether the prejudice arising from the erroneous admission of the coconspirator's statements can be cured by a cautionary instruction to disregard the statement or whether a mistrial is required. *See United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States v. Stanchich*, 550 F.2d 1294, 1297-98 (2d Cir. 1977).

(E) *Conclusion.*

[9] This opinion intends to establish minimum standards for the admissibility of coconspirator statements. Nothing stated here shall prevent a trial judge

from requiring more meticulous procedures to assure that such statements (1) are not admitted until properly authenticated by substantial independent evidence and (2) do not remain in the proof to be submitted to the jury unless their admissibility is established by a preponderance of the evidence.

[10] In the case at bar, the district court applied the rule enunciated by this court in *United States v. Apollo, supra,* as elaborated in *United States v. Oliva,* 497 F.2d 130 (5th Cir. 1974). Under that rule, the trial court did not submit the evidence to the jury for its determination of admissibility until it determined that the prosecution "ha[d] established a prima facie case of the existence of a conspiracy and of the defendant's participation therein, that is [that] the other evidence *aliunde* the hearsay would be sufficient to support a finding by the jury that the defendant was himself a conspirator." 497 F.2d 132 33. Although the procedures which we now adopt are different from the prima facie rule announced in *Oliva* we do not disturb the conclusion reached by the panel of this Court that the admission of the hearsay statements was fully supported because there was "a preponderance of the independent evidence that the conspiracy existed, that each of the defendants and appellants were members of it, and that the statements were made in the course of and in furtherance of the conspiracy."

[11] Exercising this court's supervisory power over the district courts, *see LaBuy v. Howes Leather Co., Inc.,* 352 U.S. 249, 259–60, 77 S.Ct. 309, 315, 1 L.Ed.2d 290, 299 (1957); *United States v. Mendoza,* 565 F.2d 1285, 1292 (5th Cir.) *aff'd,* 581 F.2d 89 (5th Cir. 1978) (en banc); *United States v. Chiantese,* 560 F.2d 1244, 1254 (5th Cir. 1977) (en banc), we adopt these rules only prospectively. *Cf. Chiantese, supra,* 560 F.2d at 1256. Accordingly, they are required only as to coconspirator statements which the government seeks to introduce in trials commencing after 30 days from the date of this opinion.

The judgment is AFFIRMED.

GEE, Circuit Judge, specially concurring:

Although I think the majority crafts, in its well-written opinion, a tolerable solution to the difficult evidentiary problems posed by this appeal, I share many of the concerns expressed by Judge Tjoflat in his special concurrence—especially those regarding the trial judge's control over the order of proof—and prefer the course which he suggests.

Among my difficulties with the majority opinion are its description of its construction of Rule 104 as "the orthodox position." I do not think a division of preliminary questions about the admissibility of evidence between judge and jury orthodox at all. Nor do I ascertain in the *text* of Rule 104 any disposition to depart from the received practice by assigning decision of any such matters to the jury.[1]

Because I cannot improve upon them, I offer the words of Dean McCormick, both for the proposition that decision of all such matters by the trial judge is orthodox and as explaining why it is preferable:

"It is orthodox that all questions affecting the admissibility of evidence

1. I recognize, as I must, that the Committee Notes do contain expressions supportive of the majority position. One can only wonder, however, why no faintist nod in such a direction is apparent in the rule itself.

belong to the province of the trial judge. It follows that, when the admissibility of a given piece of evidence depends upon some preliminary question of fact, the existence or nonexistence of that fact is to be determined by the judge. (Citing Wigmore.) These include such facts as: Whether a confession was voluntarily made, whether a witness has qualified as an expert, whether an instrument is admissible as an ancient document, whether sufficient foundation has been laid for the admission of secondary evidence of the contents of a written instrument, whether a conspiracy has been sufficiently shown to warrant the introduction of the statements of an alleged conspirator, ...

"Of course where the evidence as to the existence of the preliminary fact is undisputed and such as to admit of only one finding, no difficulty arises. But where the evidence is disputed and is such that a reasonable man might find either way, a number of decisions have departed from the orthodox rule. They leave the question of admissibility more or less to the jury. For example, in Massachusetts if the judge finds that the fact exists, he must admit the evidence and charge the jury to exclude it unless they also find that the preliminary fact exists. . . .

". . . . Although this heterodox practice may be due to a fortuitous combination of circumstances, arguments in its favor are not lacking. One of the most common is that adherence to the orthodox rule results frequently in the judge entirely disposing of the case. But the answer to this is: First, that there is no rule requiring that all relevant evidence be submitted to the jury, and, second, there is nothing inherently wrong with judge-made decisions.

"When the preliminary fact coincides with an ultimate fact on the merits it has been argued that since the jury must alternately pass upon the existence of the fact it makes no difference whether they do it as an incidental question of admissibility or as a final ruling on the merits. And it is said that the jury may find differently from the judge. But this is no objection. There is no requirement that the findings of the judge and jury be consistent, even if made for the same purpose. A fortiori where as here the purposes are very different. The judge passes on the question only for the purpose of deciding whether the evidence shall go to the jury. If admitted, the jury then pass upon the same question for the purpose of determining the credibility and sufficiency of the evidence.

"The sound arguments unquestionably favor the orthodox rule. In the first place, it is the simple one. To leave questions of admissibility to the jury merely 'cumbers the jury with legal definitions and offers an additional opportunity for quibbling over the tenor of the instructions.' Moreover, if these questions are left with the trial judge a greater degree of consistency will be attained. Certainly this element of predictability is desirable. Furthermore, since the very purpose of the exclusionary rules is to keep from the jury evidence which may prejudice them in their decision, this protection is better guaranteed by permitting the judge to entirely exclude objectionable evidence. Finally, unless we are prepared to scrap the exclusionary rules, it would seem that the orthodox rule must prevail, for all arguments in fa-

vor of the heterodox practice strike at the very foundation of the exclusionary rules."

1 McCormick and Ray, Texas Law of Evidence 2–5 (2d ed. 1956).

This simple rule seems to me best: what goes into the record is the responsibility of the judge; what (of this) is credited, that of the jury. I therefore concur in the result only.

TJOFLAT, Circuit Judge, with whom AINSWORTH, Circuit Judge joins, specially concurring:

The original panel in this case, after concluding that the appellants' drug conspiracy trials contained no reversible error and that their convictions should be affirmed, undertook "to revisit *Apollo* and to establish the correct standard and procedure for handling the admissibility of coconspirator statements in criminal conspiracy trials" in this circuit. *United States v. James*, 576 F.2d 1121, 1127 (5th Cir. 1978). The procedure devised was a "minitrial." Construing Fed.R.Evid. 104 and 611(a), the panel instructed that a district judge may not allow the jury to hear a coconspirator's out-of-court declaration until the judge, following a hearing conducted outside the presence of the jury, has determined by a preponderance of the evidence that the declaration is admissible under Fed.R.Evid. 801(d)(2)(E). 576 F.2d at 1131, 1132.

This case was taken en banc because the minitrial procedure fashioned by the panel is obviously unworkable and onerous. Indeed, the panel's approach might well require a district judge, after the jury has been sworn, to try the entire case twice—once at the minitrial on the admissibility question and once before the jury on the issue of guilt. The en banc majority, in vacating part IV of the panel opinion which established the new minitrial procedure, makes no comment about the panel's rationale except to say that it created possible conflicts with prior decisions of this court dealing with the admission of out-of-court coconspirator declarations. *Ante* at ——, slip op. at 3256.

Today the majority, exercising the court's supervisory power, rewrites part IV of the panel's opinion. It substitutes for the panel's rigid minitrial approach an order of proof, designed to accomplish the minitrial objective, which requires the district court's determination of admissibility "normally to be made *before* the [out-of-court declaration] is heard by the jury." *Ante* at ——, slip op. at 3260 (emphasis added). In an attempt to ameliorate the heavy burden that such a requirement will inevitably impose, especially on the prosecution and the court, during the course of a trial, the majority discards the panel's preponderance of the evidence standard for determining whether the predicate to admissibility has been established and replaces it with a lower standard, one of "substantial independent evidence." At the same time, the majority tacitly acknowledges that the substantial independent evidence standard is inappropriate, for the majority commands the trial judge, when reviewing the admission of the coconspirator's statement at the conclusion of the trial, to determine the predicate to admissibility by a preponderance of the evidence. *Ante* at ——, slip op. at 3262 3263.

In order to promulgate this new set of rules to govern the admissibility of coconspirator declarations, *ante* at ——, slip op. at 3263, the majority felt it necessary to interpret Fed.R.Evid. 104, which concerns the reception of evidence whose admissibility turns on preliminary questions. Although the majority opinion makes no explicit reference to any other Federal Rule of Evidence, it clearly implicates three of them: rule 611(a), the rule prescribing the district court's discretion in ordering the proof at trial; rule 402, the threshold rule making relevant evidence presumptively admissible; and rule 403, which requires the court to receive relevant evidence unless its probative value is substantially outweighed by the danger of unfair prejudice. I write separately not only because I believe the majority misreads the letter and the spirit of these rules, but also because they disharmonize the operation of other rules critical to the orderly and just conduct of trials in which coconspirator statements are offered.

The majority writes in the context of a case in which the defendants have been charged with criminal conspiracy, but the majority opinion sweeps far beyond conspiracy trials and impinges upon any case in which statements by those involved in concerted criminal activity implicate the accused.[1] That the coconspirator rule has general applicability is unequivocally demonstrated by the legislative history of the federal rules. "While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule *even though no conspiracy has been charged.*" S.Rep. No.93 1277, 93d Cong., 2d Sess. 24, *reprinted in* [1974] U.S.Code Cong. & Admin.News, pp. 7051, 7073 (emphasis added).

In order to understand precisely what the majority has done, I think it useful to recall the practice regarding the admissibility of coconspirator statements before the adoption of the Federal Rules of Evidence. Once this background is set forth, I shall describe what I believe to be the impact of the Federal Rules on prior practice and shall attempt to demonstrate the inappropriateness of the procedures the majority now prescribes.

I

Prior to the adoption of the Federal Rules of Evidence, a district judge faced with a hearsay objection to an out-of-court statement by a coconspirator made in the absence of the defendant[2] normally made the following inquiries after determining that the statement was relevant to an issue in the case.

First, is there a sufficient predicate to allow the statement to be received for the truth of its contents? In deciding this question, the judge looked to the evidence already presented to the jury to see if it established a prima facie showing that the statement was made by a coconspirator of the defendant during

1. The majority's rule affects any prosecution implicating scheme-type criminal conduct. For example, it would apply to prosecutions for aiding and abetting, 18 U.S.C. § 2 (1976), and those brought under the many statutes Congress has enacted to combat organized crime, *e. g.*, 18 U.S.C. § 1955 (1976) (prohibition of illegal gambling business); 18 U.S.C. §§ 1961–68 (1976) (the RICO statute). Moreover, the majority's approach goes beyond even the criminal realm to dictate the standards for the admissibility of coconspirator declarations in civil trials, because the Federal Rules of Evidence are applicable in both civil and criminal cases, Fed.R.Evid. 1101(b).

2. If the statement were made in the defendant's presence and under circumstances that would ordinarily call for a contradiction on his part, it would have been admissible under the adoptive admission exception to the hearsay rule. *E. g., United States v. Adams*, 470 F.2d 249 (10th Cir. 1972). Under the Federal Rules of Evidence, this exception is preserved in rule 801(d)(2)(B), which declares such statements not hearsay.

and in furtherance of the conspiracy. *United States v. Oliva*, 497 F.2d 130, 132 (5th Cir. 1974). If the evidence before the jury met this prima facie test, the statement would have been admitted for the truth of its contents. If the evidence failed the prima facie test, the court, generally in a voir dire hearing, might have entertained the Government's proffer of the predicate necessary to the statement's admissibility. If satisfied that the Government, by the conclusion of its case-in-chief, would have made a prima facie showing by evidence, independent of the statement itself, that a conspiracy involving the defendant existed and that the statement was made by a coconspirator during and in furtherance thereof, the court would have received the statement subject to connection, reserving to the close of the Government's case its ruling on the hearsay objection. Whether the court received the statement after the predicate to admissibility had been demonstrated or beforehand subject to connection, it was required to give the *Apollo* instruction when the statement was received.

Second, if the predicate, in the evidence presented to the jury or in the Government's proffer, were insufficient to admit the statement for the truth of the matter asserted, is the statement otherwise admissible to prove an issue unrelated to the truth of the statement? The statement might have been admissible as bearing on one or more of a variety of other issues; for example, the mere act of making the statement may be probative of the declarant's knowledge of the conspiracy[3] and its objectives, or the words spoken may tend to show the role the declarant played in the conspiracy and may be probative of his intent.

Third, if the statement tends to establish or controvert an issue regardless of its truth, does the probative value of the statement to prove matters other than its contents outweigh the prejudice flowing from the revelation of its contents to the jury and the danger that the jury might accept them as true? If the probative value outweighed the prejudice, the statement was received. Of course, in this instance an *Apollo* instruction was inappropriate.[4]

At the conclusion of the Government's case and, if warranted, at the conclusion of all the evidence, the court might have reconsidered the propriety of admitting the statement to prove the truth of its contents in conjunction with the court's entertainment of a motion for judgment of acquittal. For example, in permitting the statement to come before the jury subject to later connection, the court might have opted to defer ruling on the defendant's hearsay objection until the conclusion of the Government's case, or the court might have received the statement unreservedly, without qualification, subject only to the defendant's right to renew his objection, in the form of a

3. *Cf. United States v. Carter*, 491 F.2d 625, 628-29 (5th Cir. 1974) (statement not hearsay when probative of lack of knowledge that automobile was stolen).

4. The court might, however, have considered giving a cautionary instruction admonishing the jury not to consider the statement for the truth of its contents. The problem in giving such an instruction was (and is) that, in the event that the predicate for the hearsay exception were established subsequent to the cautionary instruction, the court would have been required to give a supplementary instruction advising the jury that it was entitled to consider the truth of the contents of the statement. Since this supplementary instruction tends to emphasize the significance of the statement, most defendants requested that the limiting instruction not be given initially.

motion to strike, at the close of the Government's proof (and, again, at the close of all the evidence if the defense chose to put on a case). In reconsidering the hearsay objection, the court examined the record to determine whether the Government had established a conspiracy by the evidence, viewed in the light most favorable to the Government under *United States v. Glasser*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), independent of the truth value of the questioned statement. If the court concluded that a conspiracy had not been proven, a ruling on the hearsay objection would be unnecessary since a judgment of acquittal would be in order. However, if the independent evidence justified the submission of the conspiracy charge to the jury, the court's assessment of the statement's admissibility continued. In the event the court found that not all the remaining prerequisites of admissibility, i. e., that the statement was made during the course of *and* in furtherance of the conspiracy, had been established by prima facie evidence, the court could have stricken the statement and admonished the jury not to consider it or it could have granted a mistrial if instructions would have been inadequate to erase the prejudice caused by the erroneous reception of the statement.[5]

The common law developed these procedures to give the trial judge maximum flexibility in ordering the proof at trial to the end that the evidence be presented in an intelligible way. *See United States v. Apollo*, 476 F.2d 156, 163 (5th Cir. 1973). The *Apollo* instruction was designed to accommodate this discretion while preserving the defendant's right not to be convicted because of an inadmissible coconspirator statement. *Id.*

II

Before embarking on a detailed discussion of the new rules of evidence and how the majority largely misconstrues them, I briefly summarize how the new rules alter the preexisting process. As the majority correctly holds, the task for determining the admissibility of coconspirator statements to establish the truth of their contents is now for the judge alone. This, rule 104(a) mandates. Therefore, the *Apollo* instruction is no longer appropriate.

In determining whether to receive a coconspirator statement under rule 801(d)(2)(E), the trial judge may consider any matter touching on the prerequisites to admissibility. He is "not bound by the rules of evidence except those with respect to privileges," Fed.R.Evid. 104(a); hence, he may consider the coconspirator statement itself. The majority distorts the manifest intent behind rule 104(a) in construing it to the contrary. Moreover, there is no place in a rule 104(a) determination for the "substantial evidence" test espoused by the majority. This test, as the majority acknowledges, is for measuring whether the predicate to admissibility is sufficient for a jury; it cannot control the judge's duty under rule 104(a) to decide whether the predicate has been established.

5. In weighing the merits of a motion to strike or for a mistrial, the trial court would of course have considered whether the statement was admissible for any purpose other than to establish the truth of the matter asserted. If the statement was probative of other matters, the court would have weighed such probative value against any prejudice that might have resulted from the jury's consideration of the statement as true. Only in the event that the prejudice outweighed the probative value would the granting of either motion have been in order. *Cf.* Fed.R.Evid. 403.

The rules do not disturb the district court's discretion in ordering the proof at trial; that discretion is reaffirmed in rule 611(a). Accordingly, complicated cases should still be tried in a manner that the court judges to be comprehensible to the jury. Thus, I believe, the rules seek to avoid a miscarriage of justice that might result if we straitjacket the district judges of our circuit by requiring them to alter the natural progression of the trial.

A

I read the Federal Rules of Evidence to envision the following procedures for the admissibility of coconspirator statements. I agree with the majority's conclusion that the rules call for the rejection of *Apollo* and that the question of admissibility is one solely for the judge under rule 104(a). I reach this result on somewhat different grounds, however. The requirements of rule 801(d)(2)(E) that the statement be made by a coconspirator during and in furtherance of the conspiracy are not conditions on the statement's *relevancy*, which is the sole concern of rule 104(b). Statements may be highly relevant even though the conditions of rule 801(d)(2)(E) are not met. A classic example of such a statement is a postarrest confession. It is not made during the conspiracy because the declarant has been arrested, *United States v. Warren*, 578 F.2d 1058, 1074 (5th Cir. 1978) (en banc), and it is hard to imagine a case in which such a confession is made in furtherance of the conspiracy. As this example amply demonstrates, the 801(d)(2)(E) requirements are not conditions on the relevancy of the statement but rather on its admissibility. It is clear, therefore, that the issue whether those requirements have been met is one for the judge under 104(a), because it provides, "Preliminary questions concerning . . . the admissibility of evidence shall be determined by the court, subject to the provisions of [104(b)]."[6]

B

As to the standard that the judge should apply in determining whether the statement is admissible, I believe that logic calls for the employment of the preponderance of the evidence test. The majority's position on this point is, to me, ambiguous at best. First it holds that the "prima facie" test of *United States v. Oliva*, 497 F.2d 130 (5th Cir. 1974) (whether the Government's case, independent of the coconspirator's statement, is sufficient to support a jury finding that the defendant was a member of the conspiracy) is inapposite because rule 104(a) now calls for the judge, not the jury, to determine the statement's admissibility. *Ante* at ——, slip op. at 3259. Then, I submit, it proceeds to adopt the very test it purports to reject. Borrowing language from *United States v. Nixon*, 418 U.S. 683, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974), the majority holds that a coconspirator's declaration is not admissible unless " 'there [is] *substantial independent* evidence of a conspiracy at least enough to take the question to the jury.' " *Ante* at ——————, slip op. at 3261. How this substantial evidence test differs from the prima facie test I am unable to perceive. Each test is met if the Government's independent evidence is sufficient to support a jury finding that the defendant was a member of the conspiracy.

In choosing the substantial evidence test the majority considers, and rejects out of hand, the preponderance of the evidence standard. It says:

> Because . . . the trial court's threshold determination of admissibility is normally to be made during the presentation of the government's case in chief and before the evidence is heard by the jury, it is more appropriate to adopt a "substantial" evidence rule rather than one which requires . . . a "preponderance" of the evidence.

Ante at , slip op. at 3260 3261. Yet, in setting forth the procedure the trial judge must follow at the conclusion of a conspiracy trial, the majority states that, upon appropriate motion, the court must determine whether the prosecution has established by a preponderance of the evidence the predicate for the admissibility of the coconspirator's statement. Thus, this anomaly may result: the judge permits the jury to hear the coconspirator's statement because the Government has shown the existence of the conspiracy by substantial evidence, but at the end of the trial the statement must be stricken because the judge, in applying the preponderance of the evidence test, determines that the conspiracy did not in fact exist.

To support my conclusion that the preponderance of the evidence standard alone must apply in resolving the question of admissibility, I posit the following hypothetical. Assume that the defendant is being tried for the substantive offense of possession of a controlled substance with intent to distribute and that he was a member of a conspiracy to achieve that end but is not charged with conspiracy. Statements made by this defendant's coconspirators would not be excludable as hearsay if it could be demonstrated that the conspiracy existed, that the defendant was a member, and that the statement was made during and in furtherance of the conspiracy. *United States v. Wright*, 491 F.2d 942, 946 (6th Cir. 1974); *United States v. Mendoza*, 473 F.2d 692, 695 (5th Cir. 1972); see text following note 2 *supra*. *But see United States v. Harrell*, 436 F.2d 606, 616 (5th Cir. 1970), *cert. denied*, 409 U.S. 846, 93 S.Ct. 49, 34 L.Ed.2d 86 (1972). It seems clear to me that the task for the trial judge in this instance would be to determine these conditions by a preponderance of all the evidence.[7] It is immediately apparent that it would not be enough that there be sufficient evidence for a jury finding that these conditions were met; indeed, the jury would never pass on the issue. The judge would be compelled to consider all the evidence, weigh it and make credibility choices, and determine whether it preponderates in favor of a finding that rule 801(d)(2)(E) has been satisfied. The rules do not differentiate between the standards for admitting coconspirator statements in conspiracies that are

6. This approach would render unnecessary the confusing, and I believe incorrect, suggestion by the original panel, 576 F.2d 1121, 1129 (5th Cir. 1978), which is adopted by the majority, *ante* at — —, slip op. at 3258, that the jury cannot consider prejudicial evidence when determining relevancy under rule 104(b). This circuit, sitting en banc, recently rejected the notion that the jury is incompetent to consider conditionally relevant evidence that is substantially prejudicial. In *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978) (en banc), we held that rule 104(b) supplies the standard for the admissibility of evidence relating to offenses extrinsic to the indictment. As we observed in *Beechum*, extrinsic offense evidence is inherently prejudicial. *Id.* at 910.

7. The preponderance standard is applied to determine the admissibility of other highly prejudicial evidence. Suppression hearings are governed by this standard, *United States v. Matlock*, 415 U.S. 164, 177 n.14, 94 S.Ct. 988, 996, 39 L.Ed.2d 242 (1974), as are hearings to determine the voluntariness of confessions, *Lego v. Twomey*, 404 U.S. 477, 486-87, 92 S.Ct. 619, 625, 30 L.Ed.2d 618 (1972).

charged and those that are not, and I find nothing calling for a distinction. Surely, the evidentiary policies in both cases are identical. Hence, the majority's reliance on a "substantial evidence" standard, which it defines to be " 'at least enough [evidence] to take the question to the jury,' " *ante* at ——, slip op. at 3261, is in my view inappropriate.

The majority may be concerned that requiring proof by preponderance would impose too heavy a burden on the prosecution, but this is the standard employed in all instances where the judge determines admissibility under rule 104(a). Who would question the appropriateness of the preponderance standard when the judge decides preliminary issues such as the competency of witnesses, the existence of privileges, or the availability of the numerous exceptions to the hearsay rule? Historically, trial courts have been called upon to consider evidence, often in the form of a proffer by counsel, in deciding these preliminary issues. The competency of a witness may, for example, turn not only on the court's observation of the witness during voir dire but also on the weighing of other matters bearing on the witness's capacity to testify. To permit the witness to testify the court must find that the evidence preponderates in favor of competency; it could not seriously be contended that the court should allow a witness to testify if the greater weight of the evidence indicates that he is incompetent or if the evidence on the competency issue were in equipoise.

The trial court employs the same procedure in determining whether any of the common law privileges may be invoked. For example, in deciding whether an attorney-client privilege exists, the court must be presented with a factual predicate showing the existence of the attorney-client relationship, that the testimony sought to be elicited deals with confidential communications made in the context of that relationship, and that the privilege has not been waived.

The hearsay exceptions embodied in rules 803 and 804 present classic examples of factual inquiries that must be undertaken by the trial judge. It is apparent from a cursory reading of each of these exceptions that a factual inquiry is required and that the evidence must preponderate in favor of an exception before the hearsay can be admitted. Consider, for example, the catchall exceptions in 803(24) and 804(5), which allow hearsay not expressly covered by a designated exception to be received "if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other." Rule 104(a) mandates that the judge resolve the preliminary issues with finality. He cannot, as the majority would have him do, discharge this duty simply by finding, when faced with an objection to the reception of the evidence, that the proponent of the evidence has made a showing sufficient to take the issue of admissibility to a hypothetical jury.

In sum, the burden of resolving factual issues upon which admissibility is predicated is commonplace in the courtroom. The burden under the coconspirator exception is no different and should receive no different treatment—the predicate for the admissibility of a coconspirator declaration should be established by a preponderance of the evidence, not by a standard that measures the sufficiency of a case for the jury. The intolerable burden that the majority evidently perceives to be involved in requiring a trial judge to determine the admissibility of coconspirator declarations by a preponderance of the evidence is not caused by the rules of evidence but by the majority's insistence that "the trial court's . . . determination of admissibility . . . normally . . . be made . . . *before* the evidence is heard by the jury." *Ante* at , slip op. at 3260 (emphasis added).

I would not deny the trial judge the considerable discretion provided him by the rules to control the "mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." Fed.R.Evid. 611(a). The trial judge is given wide latitude by this rule to decide when during the trial and in what manner the predicate for admissibility is developed. Depending upon the circumstances of the case, he may deem it prudent to receive the evidence conditionally on nothing more than the representations of counsel at a routine sidebar conference. At the other extreme, he may think that the potential for mistrial, if the admission of the evidence proves to be erroneous, is so great that nothing less than a full-blown evidentiary hearing is necessary to ensure that the statement is properly admissible. *See* McCormick, *Evidence* § 53, at 122 (2d ed. 1972). Rule 611(a) contemplates that the trial judge enjoy the broad spectrum of discretion between these extremes. But the majority's requirement that the issue of admissibility normally be resolved before the statement is received in evidence would confine him to the latter extreme—the mini-trial—if the decision had to be made by a preponderance of all the evidence. It is only for this reason that the substantial evidence rule is "more appropriate." *Ante* at , slip op. at 3260.

I can imagine no more compelling situation in which the judge's discretion in evaluating the predicate to admissibility is necessary and appropriate than in conspiracy-type trials, which are often highly complex and always difficult to present to the jury in a meaningful way. The majority would permit the trial judge to depart from the normal minitrial procedure and to receive the coconspirator's declaration subject to connection only if it determines that "it is not reasonably practical" for the prosecution to establish the predicate to admissibility by substantial independent evidence before eliciting the declaration in the presence of the jury. *Ante* at —, slip op. at 3262. The majority does not indicate what circumstances might make it "not reasonably practical" for the prosecutor to establish the predicate to admissibility in the preferred order, whether and to what extent findings as to the impracticability must be expressed by the trial judge if he declines to follow the normal procedure, and the standard we shall henceforth employ in reviewing his action.

It should always be borne in mind that however the trial judge exercises his discretion in deciding to admit a hearsay statement or any other evidence to which objection has been voiced, his decision is subject to review before the case is submitted to the jury. If a party persists in its objection, the judge will reassess his earlier ruling on the record as a whole, both at the conclusion of the Government's case-in-chief and at the close of all the evidence, to determine whether the predicate to admissibility has been established by a preponderance

of the evidence.[8] If, for example, the predicate to the admissibility of a coconspirator's statement to establish the truth of its contents is not found by a preponderance of the evidence, the judge may instruct the jury to disregard the statement or, if justice so requires, grant a motion for mistrial. At this posture of the case, the trial judge would of course consider whether the statement had any evidentiary value apart from its hearsay aspects and, if so, would determine its admissibility under rule 403 (quoted in note 12 *infra*). See note 5 *supra*.

C

Contrary to the majority's position, I would allow the trial judge to consider the contents of the proffered statement in determining its admissibility. I think this is the clear mandate of the last sentence of rule 104(a), which states, "In making its determination [the court] is not bound by the rules of evidence except those with respect to privileges."[9] Significantly, the Supreme Court, in determining that the judge may consider hearsay at suppression hearings, made reference to what was then proposed rule 104(a) and went on to observe,

> There is . . . much to be said for the proposition that in proceedings where the judge himself is considering the admissibility of evidence, the exclusionary rules, aside from the rules of privilege, should not be applicable; and the judge should receive the evidence and give it such weight as his judgment and experience counsel. However that may be, certainly there should be no automatic rule against the reception of hearsay evidence in such proceedings . . . .

United States v. Matlock, 415 U.S. 164, 175, 94 S.Ct. 988, 995, 39 L.Ed.2d 242 (1974).

My reading of the rule is also reinforced by the Advisory Committee Notes to rule 104(a). "'[T]he judge should be empowered to hear any relevant evidence, such as affidavits or other reliable hearsay.'" 28 U.S.C.A. Rules of Evidence at 41 (1975) (quoting McCormick, *Evidence* § 53, at 123 n.8 (1st ed. 1954)). The Notes continue,

> An item, offered and objected to, may itself be considered in ruling on admissibility, though not yet admitted in evidence. Thus the content of an asserted declaration against interest must be considered in ruling whether it is against interest. . . . In the case of hearsay, it is enough, if the declarant "so far as appears [has] had an opportunity to observe the fact declared."

Id. (again quoting McCormick, *Evidence* § 10, at 19 (1st ed. 1954)). I am unable to reconcile the majority's position—that the coconspirator's statement cannot be used for *any* purpose in determining its admissibility under rule 104(a)—with the language of the rule, the Advisory Committee Notes, or the Supreme Court's observation in *Matlock*.

As a practical matter, I do not think the determination whether the statement should be received in evidence will in many cases turn on whether the court considers the truth-value of the statement. A decision that the statement is admissible to prove its truth automatically establishes that the statement would be admissible for other purposes, since satisfaction of "[t]he requirement that admissible declarations of coconspirators be in furtherance of the conspiracy virtually insures that the declarations will fall within the category of 'verbal acts,' which are not hearsay." McCormick, *Evidence* § 53, at 19 (2d ed. Supp.1978) (footnotes omitted). To determine whether this requirement has been met clearly necessitates consideration of the content of the statement.

The majority paints with such a broad brush, however, that it apparently obliterates the possibility of admitting coconspirator statements when relevant to issues apart from the verity of the statements. There is absolutely nothing in its opinion to the contrary. Indeed, the majority states, "We conclude that . . . a declaration by one defendant is admissible against other defendants *only when* there is a 'sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy,' [*United States v. Nixon*, 418 U.S. 683, 701, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974)], and that 'as a preliminary matter, there must be *substantial, independent* evidence of a conspiracy at least enough to take the question to the jury.' *Id.* at 701 n.14, 94 S.Ct. at 3104 n.14, 41 L.Ed.2d at 1060 n.14 (emphasis added)." *Ante* at ——, slip op. at 3261 (except as noted, emphasis added).[10] In my judgment this approach amounts to a judicial repeal of rule 402,[11] which makes relevant evidence presumptively admissible. United States v. Beechum, 582 F.2d 898, 907 n.7 (5th Cir. 1978) (en banc). Invariably, a coconspirator's declaration is probative of matters other than the truth of its contents—the declarant's membership in the conspiracy, the character of his intent, the objectives of the conspirators, the identity of members other than the defendant and so on. And as a trial progresses and other issues are raised, such as the credibility of the witnesses, including the declarant,

8. The majority concedes that at the close of all the evidence, the judge must decide a motion to strike by a preponderance of all the evidence. *Ante* at ——, slip op. at 3262. The anomaly of applying at this point a different standard from the one applied when the statement was offered has already been noted. It is interesting to note that the majority makes no provision for a preponderance of the evidence review at the close of the Government's case-in-chief, as distinguished from the close of all the evidence. The majority either thinks such a review is unnecessary at this juncture or believes that such a review, before the trial is concluded, would be too burdensome.

It seems to me that both the trial judge and the parties would want to know, at the close of the Government's case-in-chief, precisely what evidence is in the record *and* will eventually be considered by the jury in its deliberations. Until this is determined, the court may find it difficult to pass on a motion for judgment of acquittal or for a mistrial. It would be anomalous to decide either motion on the basis of evidence admissible only because "substantial evidence" supported the predicate, but the majority does not say what standard should be used at this point.

9. To this extent, I believe that rule 104(a) overrules the language quoted by the majority from *United States v. Glasser*, 315 U.S. 60, 74–75, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942). *Ante* at ——, slip op. at 3261. The First Circuit has so construed the rule. *United States v. Martorano*, 557 F.2d 1, 12 (1st Cir. 1977).

10. The quotations from *Nixon* are, as the majority notes, dicta. More importantly, *Nixon* was decided a year before the Federal Rules of Evidence became effective and the Court did not purport to interpret the proposed rules. *Cf. United States v. Matlock*, 415 U.S. 164, 1975, 94 S.Ct. 988, 995, 39 L.Ed.2d 242 (1974).

11. Rule 402 provides as follows:

> Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible
>
> All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is not admissible.

the contents of his out of court statement may well have additional bases of admissibility.

Finally, in addition to restricting, if not altogether foreclosing, the trial judge's authority to admit coconspirator declarations to prove other matters unless the prosecution complies with the substantial independent evidence rule, the majority removes from the trial judge's discretion his authority under rule 403 [12] to weigh the probative value of the evidence for other purposes against its prejudice when considered for the truth of its contents. In effect, the majority creates a conclusive presumption that the danger of unfair prejudice substantially outweighs its probative value.[13] Although written in the context of a criminal coconspirator's statement, the logic of the majority's opinion would apply equally to any admissions, if not all out-of-court utterances, as to which a hearsay objection is raised. I find nothing in the rules, common law, or commentary that would justify the majority's special treatment of the narrow evidentiary question before us.

III

It seems to me that the only justification that the majority has for depriving the trial judge of his traditional discretion in ordering the proof at trial is that, given a free hand to control the presentation of the evidence, he may have to declare a mistrial because of the erroneous admission of a hearsay statement. The majority professes that its procedures are designed to obviate "the inevitable serious waste of time, energy and efficiency when a mistrial is required." *Ante* at ——, slip op. at 3262. I find it hard indeed to believe the majority's rule is founded on a concern for judicial economy. The majority's preadmission determination mandate will affect virtually every federal trial, both criminal and civil, involving concerted activity, because its analysis is founded on the construction of a rule of evidence of general applicability in all proceedings in federal district court. *See* Fed.R.Evid. 1101(b); note 2 *supra*. Moreover, this preadmission determination rule will be applied whenever a coconspirator statement is sought to be admitted, whether for the truth of the matter asserted or otherwise. In today's world of increasingly complex and sophisticated criminal cases, this will occur repeatedly in a given trial.

The procedure I believe the federal rules call for would result in so few unnecessary mistrials that far less judicial energy would be wasted than under the majority's plan. The majority admits that the defendant will not be impermissibly prejudiced by the admission of a statement subject to connection if, at the end of trial, the trial judge is able to find the predicate for admission by a preponderance of the evidence. Experience leads me to think that this will be the case in practically every conspiracy

12. Rule 403 provides as follows:

> Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time
>
> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

13. The majority would permit statements to come in subject to connection if it is "not reasonably practical" to establish the predicate prior to admission. This exception still requires that the 801(d)(2)(E) tests be met; it would not permit the admission of statements for their nonhearsay value alone.

trial that would not be subject to dismissal for lack of sufficient evidence for conviction. In those few cases where there is sufficient evidence to go to the jury on the issue of guilt but insufficient evidence for admissibility of the coconspirator's statement,[14] some mistrials may be avoided by limiting instructions. In most of these cases, I submit, the statement would be admissible for reasons apart from its truth. See note 5 *supra*. Only in the very infrequent case, therefore, where the coconspirator statement is not admissible for *any* purpose and a cautionary instruction cannot remove the prejudice engendered by its admission would a mistrial be required.

In sum, perhaps the steps the majority has taken today in laying down a set of rules to control the Government's use of coconspirator statements, *ante* at , slip op. at 3263, are in reality motivated by a concern that criminal cases meriting mistrial because of the erroneous reception of coconspirator declarations will nevertheless result in convictions. This concern may be amplified by the majority's frustration at the inability of an appellate tribunal to retry such cases and to remedy the perceived injustice; we are left with but a cold record from which to determine whether the statement was sufficiently prejudicial to require reversal. We are required to defer to the district judge in all but the most egregious circumstances. But we are thus limited in every appeal based on the erroneous admission of evidence. Rather than adopt the far reaching measures fashioned by the majority especially for criminal trials (but clearly applicable in all cases involving concerted activity), I would rely upon our district judges to make proper and careful application of the rules of evidence and procedure, to the end that justice may be achieved.

14. This situation would occur when the evidence is such that it would support a conviction when viewed in the light most favorable to the Government, *United States v. Glasser*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), but does not preponderate in favor of the existence of a conspiracy when its quality is taken into account. It will also occur when, although the evidence preponderates in favor of a conspiracy, it does not weigh in favor of each of the remaining prerequisites to admissibility, i. e., that the statement was made by a coconspirator during and in furtherance of the conspiracy.

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v.

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HENRY SMITH, PETITIONER

v.

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KENNETH WAYNE WHITMORE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

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v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals en banc (Pet. App. B1-B23)[1] is reported at 590 F. 2d 575. The panel

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[1] "Pet. App." refers to the appendix to the petition in No. 78-1412.

opinion of the court of appeals (Pet. App. A1-A14) is reported at 576 F. 2d 1121.

JURISDICTION

The judgment of the court of appeals en banc was entered on February 12, 1979. The petitions for a writ of certiorari in Nos. 78-1412 and 78-6369 were filed on March 14, 1979. On March 15, 1979, Mr. Justice Rehnquist extended the time for filing the petition for a writ of certiorari in No. 78-6431 to and including March 27, 1979. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the admission of out-of-court statements of petitioners' co-conspirators constituted reversible error.

2. Whether the evidence was sufficient to establish each petitioner's participation in the conspiracy.

3. Whether the evidence established the existence of a single conspiracy (Nos. 78-1412 and 78-6431).

STATEMENT

Following a jury trial of petitioner James and others, and a subsequent jury trial of petitioners Smith and Whitmore, in the United States District Court for the Northern District of Georgia, each petitioner was convicted of conspiracy to possess heroin and cocaine with intent to distribute, in violation of 21 U.S.C.

841(a)(1) and 846.[2] Each was sentenced to the custody of the Attorney General under 18 U.S.C. 4205(c) for the maximum period of 15 years. Thereafter, petitioner Whitmore was sentenced to 12 years' imprisonment with a special parole term of three years.

1. The evidence at both trials, which is summarized in the panel opinion of the court of appeals (Pet. App. A1-A14), established a conspiracy to distribute heroin and cocaine in Atlanta and Philadelphia, with Fred Hill as the central figure. Hill obtained his supply from sources in California (Pet. App. A3).

In early 1974, Johnny Mack Gordon, an unindicted co-conspirator, assisted Hill in distributing packages of what Hill referred to as "boy," a street term for heroin, from Hill's white Mercury "stash" car. On instructions from Hill, Gordon made deliveries to Hill's Atlanta customers, collecting from $1,000 to $1,200 per ounce. When Gordon made his first delivery, the car contained 25 one-ounce packages. It was refilled on two occasions before Gordon's arrest in August 1974. The car was seized at the same time, and 44 ounces of heroin and three ounces of cocaine were found in it (Pet. App. A3).

The evidence further showed that sometime around New Year's Eve in 1973, petitioner James flew from Philadelphia to Atlanta and obtained heroin from Hill, who took it from a white Ford or Mercury. James directed co-conspirator Marlene Cochran to repackage

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[2]Petitioner Smith was originally tried together with petitioner James, but the jury was unable to agree on a verdict as to Smith. He was subsequently tried with petitioner Whitmore, who had been a fugitive at the time of the first trial (Pet. App. A3).

it and take it back to Philadelphia. On a later occasion Hill telephoned petitioner Smith and stated that he was looking for petitioner James because he had a package to be picked up by James for distribution on the streets (Pet. App. A3-A4).

The evidence at the trial of petitioners Smith and Whitmore showed that in the late spring or early summer of 1974, Gordon, relying upon a representation by Whitmore of a pre-existing agreement between himself and Hill, gave Whitmore two packages from the "stash" car. The evidence also showed that Whitmore failed to appear for trial on the date originally set and, when subsequently arrested, denied his identity. He was carrying another person's driver's license at the time (Pet. App. A4-A5).

The evidence further showed that from the summer to the fall of 1974, co-conspirator Marlene Cochran sold narcotics in Philadelphia for Smith from Smith's apartment or her own. In November 1974, she visited Smith's residence in Atlanta, where she received a call from Hill, who wanted to find James. Later Smith told her about a telephone conversation with Hill during which Hill said that he had a package for James to purchase in Ohio. When James could not be located, Smith agreed to accept the package. He then directed his daughter to obtain $2,000 and to pick up the package in Ohio (Pet. App. A6).

Prior to trial petitioners requested a pretrial hearing outside the presence of the jury to determine the admissibility of co-conspirator statements. The district court denied the motion, stating that cautionary instructions of the kind required in *United States* v.

Apollo, 476 F. 2d 156 (5th Cir. 1973), would adequately protect the defendants (Pet. App. A8).

2. A panel of the court of appeals affirmed the convictions (Pet. App. A1-A14). It observed that because petitioners had moved for a pretrial hearing outside the presence of the jury to determine the admissibility of co-conspirator declarations, citing Fed. R. Evid. 104(a) and (c), it was required to consider the effect of the Federal Rules of Evidence upon previous Fifth Circuit law, which allocated the responsibility of determining the admissibility issue to the jury (Pet. App. A8). See *United States* v. *Apollo, supra.* The panel held first that because co-conspirator declarations carry risks of prejudice similar to those attending the determination of the voluntariness of a confession, their admissibility, like the admissibility of allegedly coerced confessions, should be determined by the trial judge under Rule 104(a) (*id.* at A10-A12).

The panel then decided on the standard to be applied by the judge—one "high enough to afford adequate protection to the defendant against whom the evidence is offered, yet not so high as to exclude trustworthy relevant evidence" (*id.* at A12). It concluded that the proper standard is proof "by a preponderance" of the independent evidence "that the conspiracy existed, that the defendant and the declarant were members of it, and that the statements were made in the course of and in furtherance of the conspiracy" (*ibid.*). Applying this "preponderance" standard, the panel held that the co-conspirator declarations were properly admitted in these cases (*id.* at A14). The panel further held that a trial judge can no longer allow the jury to hear a co-

conspirator declaration until the court has made the preliminary determination that it is admissible, following either the development of independent proof at trial or an extrajury showing of proof (*id.* at A13-A14).

On other issues raised on appeal, the panel held that the evidence was sufficient to support the jury's verdict as to petitioners James, Smith, and Whitmore (*id.* at A4-A6), that Whitmore's participation in the conspiracy was adequately shown by nonhearsay evidence (*id.* at A5), and that the evidence established "a unified scheme in which all appellants joined" rather than multiple conspiracies (*id.* at A6-A7).

3. On en banc review, the court of appeals affirmed the convictions, adopting the panel opinion on all issues except the portion concerning the proper treatment of co-conspirator declarations (Pet. App. B3). The majority, exercising its supervisory power, substituted for *Apollo* a procedure requiring the trial court to determine admissibility "normally * * * before the [out-of-court declaration] is heard by the jury" (*id.* at B7). For this initial determination, the court instructed, the trial court is to employ a standard of "substantial" independent evidence (*id.* at B7-B8); but at the conclusion of the trial, a trial judge reviewing the admission of co-conspirator statements must employ a preponderance standard (*id.* at B9). The court concluded, however, that it would "not disturb the conclusion reached by the panel of this Court that the admission of the hearsay statements was fully supported because there was 'a preponderance of the independent evidence that the conspiracy existed, that

each of the defendants and appellants were members of it, and that the statements were made in the course of and in furtherance of the conspiracy' " (*id.* at B10).[3]

ARGUMENT

1. Petitioners James (78-1412 Pet. 6-8) and Whitmore (78-6431 Pet. 11, 23) contend that this Court should resolve a conflict among the circuits as to the appropriate standard for admission of co-conspirator statements.[4]

But as we have frequently stated in our oppositions to certiorari petitions in this Court (see, *e.g.*, *Macklin* v. *United States*, cert. denied, No. 77-6895 (Oct. 2, 1978)),[5] whatever the proper standard for determining the admissibility of co-conspirator statements, it seems likely that the variance in its formulation will seldom, if ever, produce different results. Indeed, in the instant cases the evidence of the existence of the conspiracy and petitioners' participation therein met the "prima facie" test employed by the district court, the "reasonable doubt" test presumably employed by the jury under the *Apollo* rule, and the "preponderance" standard used by the panel and the en banc court below. Accordingly, resolving the conflict on the formulation of the test would not aid petitioners.

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[3]The court also held that the prescribed new procedure would be required only for trials commencing 30 days after its opinion issued (*ibid.*).

[4]The conflict is discussed by the en banc court (Pet. App. B7 n.4).

[5]We are furnishing copies of the government's brief in *Macklin* to petitioners' counsel.

These cases thus are not appropriate vehicles for reviewing the question.

2. Petitioners James (78-1412 Pet. 8-10) and Smith (78-6369 Pet. 8, 11-13) further contend that the court of appeals should have remanded their cases to the district judge for a hearing in accordance with Rule 104(c) of the Federal Rules of Evidence and an on-the-record determination of the admissibility of co-conspirator statements. This, however, would have been a useless gesture, since both the panel and the en banc court concluded that the independent evidence at each petitioner's trial met the preponderance standard as a matter of law (Pet. App. A14, B10).

Moreover, the new procedures for admitting co-conspirator statements adopted by the en banc court have been established not because the court considered that the *Apollo* procedures deny defendants a fair trial, but because the court concluded that the new procedures would obviate "the 'danger' to the defendant if the statement is not connected and because of the inevitable serious waste of time, energy and efficiency when a mistrial is required" (Pet. App. B9). The court's decision to give only prospective application to its new rules regarding co-conspirator statements is in accord with the practice of other courts[6] and does not deny

[6]Decisions in other circuits interpreting Rule 104(a) to require the judge to determine admissibility have been consistently applied only prospectively. See, *e.g.*, *United States* v. *Santiago*, 582 F. 2d 1128, 1135 (7th Cir. 1978); *United States* v. *Enright*, 579 F. 2d 980, 986-987 (6th Cir. 1978); *United States* v. *Bell*, 573 F. 2d 1040, 1044-1045 (8th Cir. 1978); *United States* v. *Martorano*, 557 F. 2d 1, 11 (1st Cir.), aff'd on rehearing, 561 F. 2d 406 (1977), cert. denied, 435 U.S. 922 (1978).

petitioners any rights to which they are entitled. Indeed, as the panel of the court of appeals stated (Pet. App. A14 n.9), under *Apollo* procedures the defendants in these cases received a "significant safeguard" that will not be afforded future defendants—the admissibility of co-conspirator statements under *Apollo* was judged under the stringent reasonable doubt standard.

3. Petitioner Whitmore contends (78-6431 Pet. 9, 12) that the evidence of his participation in the conspiracy, independent of the co-conspirator statements, was insufficient to support admission of such statements. As the panel observed in rejecting this claim (Pet. App. A5): "Whitmore's own statement to Gordon * * * provides proof of all of the essential elements of the conspiracy charged." Whitmore told Gordon that he had discussed a transaction with Hill, and, while Hill was out ot town, he accepted two ounces of heroin from Gordon. By his own words and conduct Whitmore demonstrated that he had "a consensual agreement" with Hill and that he knew that Gordon worked for Hill in distributing heroin (*ibid.*). Accordingly, his role was sufficiently shown by evidence independent of the co-conspirator statements admitted at his trial.

4. Each petitioner contends (see 78-1412 Pet. 12-16; 78-6369 Pet. 7-8; 78-6431 Pet. 9) that the evidence was insufficient to establish his participation in the conspiracy. The panel below properly concluded that the evidence as to each petitioner amply demonstrated his role in the narcotics conspiracy charged.

The evidence showed that James transported to Philadelphia heroin obtained from Hill in Atlanta, and that he was called by Hill at Smith's house to pick up a package in Ohio. As the panel concluded, "these two incidents are sufficient to support the jury's verdict of guilty beyond a reasonable doubt" (Pet. App. A4). The fact that this evidence was given by a witness (Cochran) who took drugs and who admitted to being "high" during part of her trip to Atlanta with James goes to its weight and does not destroy its sufficiency, as petitioner James contends (78-1412 Pet. 13-16), particularly since Cochran's testimony was corroborated in some details by the testimony of Johnny Mack Gordon (compare Pet. App. A3 with Pet. App. A4).

In addition to the independent evidence of Whitmore's participation (discussed *supra*, page 9), the government showed that when Hill returned to town and learned that Gordon had given Whitmore two ounces of heroin, Hill told a co-conspirator that Whitmore already owed him money for five ounces of heroin and that Gordon had given Whitmore five more ounces, for which Hill had not been paid. Later Hill told the same co-conspirator that Whitmore had paid him. This evidence, coupled with Whitmore's own statements to Gordon and his failure to appear at trial, amply supported his conviction (see Pet. App. A4-A5).

Smith's participation in the conspiracy was shown by evidence that he sold narcotics in Philadelphia and that he agreed to pick up a "package" of Hill's in Ohio that was intended for James. As the panel below concluded (Pet. App. A6), Smith "must have known about Hill's operation and that others, James, for example, were involved in it"; by entering into an agreement with Hill, he joined the conspiracy.

5. Petitioners James (78-1412 Pet. 10-12) and Whitmore (78-6431 Pet. 10, 28-30) contend that the evidence was insufficient to show that there was a single conspiracy as alleged in the indictment. They argue that the government failed to prove that the several conspirators were aware of each other and operated within a common scheme to distribute cocaine and heroin. The panel of the court of appeals, however, correctly rejected their contention, explaining (Pet. App. A6-A7):

> The existence of multiple conspiracies is a fact question for the jury * * * and there is ample support in the record for the jury's conclusion that the appellants were members of the one conspiracy alleged. Each appellant dealt with Hill or Gordon under circumstances which clearly demonstrated their knowledge of the fact that Hill's operation encompassed more than just Hill.

But even assuming that the evidence showed two separate conspiracies, as both petitioners claim, "[t]he true inquiry * * * is not whether there has been a variance in proof, but whether there has been such a variance as to 'affect the substantial rights' of the accused." *Berger* v. *United States*, 295 U.S. 78, 82 (1935). We submit that "substantial rights" were not infringed in these cases. The allegations in the indictment "definitely informed [petitioners] as to the charges against [them], so that [they could] * * * present [their] defense[s] and not be taken by surprise by the evidence offered at the trial," and it further "protected [them] against another prosecution for the same offense" (*ibid.*).

Nor, on the facts of these cases, were petitioners or their co-defendants prejudiced by the "dangers of

transference of guilt from one to another across the line separating conspiracies * * *." *Kotteakos* v. *United States*, 328 U.S. 750, 774 (1946). Unlike *Kotteakos*, these cases involved a relatively simple set of facts. The alleged variance between the indictment and the proof at trial is thus "entirely different" from the problem arising from the eight separate conspiracies presented to the jury in *Kotteakos* (328 U.S. at 766). The transactions in these cases were easily distinguishable. Petitioner James was involved in purchasing heroin from Hill, causing it to be delivered to Philadelphia, and attempting to sell a package in Ohio. Petitioner Whitmore was involved in a transaction with Gordon, Hill's agent, and a transaction with Hill himself. The evidence relating to each transaction was presented to the jury in a compartmentalized fashion, without any overlap. Neither petitioners nor their co-defendants suffered any "loss of identity in the mass," with the concomitant danger of an "unwarranted imputation of guilt from others' conduct." *Kotteakos* v. *United States*, *supra*, 328 U.S. at 776-777. Indeed, the distinctness of each sale is precisely what has given rise to the variance issue here.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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